

(29,805)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 495

JAMES C. DAVIS, AS DIRECTOR GENERAL OF RAILROADS
AND AGENT UNDER SECTION 206, TRANSPORTATION
ACT, 1920, PETITIONER,

vs.

A. E. MANRY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF GEORGIA

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[fol. 1] **IN SUPERIOR COURT OF LEE COUNTY**

BILL OF EXCEPTIONS—Filed July 8, 1922; filed in C. C. A. July 19, 1922

Be it remembered, That at the November term, 1921, of the superior court of Lee county, His Honor, Z. A. Littlejohn, Judge of the superior courts of the Southwestern circuit presiding, there came on to be heard the case of A. E. Manry v. John Barton Payne, as director-general of railroads of the United States, operating the Central of Georgia Railroad, the same being an action for damages. A demurrer duly filed to the original petition was heard and the plaintiff on said date filed an amendment to his petition whereupon the defendant renewed his demurrer to the petition as amended, and the court overruled said demurrers. Defendant excepted pendente lite to said ruling, his exceptions being duly certified and entered of record; and defendant hereby assigns error upon the judgment overruling said demurrers and assigns error upon the exceptions pendente lite complaining of the overruling of said demurrers.

Be it further remembered that at the May term, 1923, of Lee superior court, plaintiff filed an amendment to said petition making as party defendant in lieu of the defendant above named, Jas. C. Davis, as director-general of railroads of the United States and agent under §206 of the transportation act of 1920, and said case thereupon proceeded to trial with said named parties.

A verdict was rendered in said cause against the defendant therein for the sum of \$7,500, and judgment rendered accordingly. During the same term, defendant made a motion for new trial and the hearing on same was set for July 8, 1922, when an amendment to said motion for new trial was duly filed and allowed, and the judge aforesaid, on said date, passed an order denying said motion, to which said order defendant excepted and now excepts and assigns the same as error and says that the court should have granted a new trial on each and every one of the grounds set forth in the motion and amended motion for new trial.

Defendant specifies as material to a clear understanding of the [fol. 2] errors complained of the following parts of the record:

1. The original petition in said case;
2. The demurrers of the defendant;
3. The amendment to the petition filed on November 7, 1921;
4. The judgment on the demurrers entered on November 7, 1921;
5. Exceptions pendente lite and order thereon complaining of the ruling on the demurrers, certified on December 29, 1921.
6. The defendants' answer;

7. The charge of the court;
8. The verdict and judgment;
9. The motion and amended motion for new trial and all orders thereon;
10. Brief of evidence.

The defendant specifies in connection with all of the foregoing the dates of entries of filing and any orders of the court or judge in connection therewith.

And now comes the said defendant, within thirty days from the date of said order overruling said motion for new trial and presents this bill of exceptions and prays that the same may be signed and certified, that the errors complained of may be reviewed and corrected.

Pottle & Hofmayer, Attys. for Jas. C. Davis, as Director-General of Railroads of U. S. and Agent under §206 of the Transportation Act of 1920. P. O. Address: Albany, Ga.

IN SUPERIOR COURT OF LEE COUNTY

CERTIFICATE OF THE JUDGE SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Lee county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the [fol. 3] present term of the Court of Appeals that the errors alleged to have been committed may be considered and corrected.

This July 8th, 1922.

Z. A. Littlejohn, Judge Superior Courts, Southwestern Circuit.

CLERK'S OFFICE, SUPERIOR COURT OF LEE COUNTY, GA.

CLERK'S CERTIFICATE

July 17, 1922.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case therein stated; and that a copy thereof has been made and is now on file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year last above written.

G. A. Wallace, Clerk. [Seal.]

Due and legal service of the within bill of exceptions acknowledged; copy and all other and further notice and service waived.

This July 8th, 1922.

Walter Defore & Jas. C. Estes, Macon, Ga. W. G. Martin,
Leesburg, Ga., Attorney for A. C. Manry, Deft. in Error.

[File endorsement omitted.]

[fol. 4] [File endorsement omitted.]

[fol. 5] GEORGIA,
Lee County:

IN SUPERIOR COURT OF LEE COUNTY

PETITION—Filed Dec. 31, 1920

To the Superior Court of said county:

A. E. Manry brings this his petition against the defendant, John Barton Payne, as director general of railroads of the United States and agent under section 206 of the transportation act of 1920, and shows to the court the following facts:

1. That said defendant has injured and damaged your petitioner in the sum of \$50,000.

2. That heretofore, to wit, on the 29th day of January, 1920, and prior and subsequently thereto, Walker D. Hines as director general of railroads of the United States was operating the southwestern division of the Central of Georgia Railway Company between Macon, Georgia, and Montgomery, Alabama, under a contract as provided in the act of Congress relating to the operation of railroads during the period of the late war.

3. That your petitioner was employed by the said defendant Walker D. Hines, as director general as aforesaid, during said time and was working in the capacity of baggage man.

4. That at Smithville in said county of Lee, State of Georgia, on or about the 29th day of January, 1920, and at about six o'clock a. m. petitioner was baggage man on train No. 11 from Macon, Georgia, to Montgomery, Alabama, and at the time and place aforesaid was engaged in assisting the train crew in coaling the engine drawing said train, which was then and there the duty of petitioner, and petitioner was then and there acting for said defendant in the discharge of his duty as an employe of the defendant in the capacity aforesaid.

5. Petitioner shows that said engine had been coaled, and that the train crew were going to their respective posts of duty, and that petitioner had stepped down from the coal chute on to the tender of said locomotive, and was going back to the rear of said tender to

[fol. 6] climb down the ladder at the rear thereof and get over to the side of said tender so that he would be in position at the proper time and place to adjust the couplers between the said tender and said train, and to see that the coupling was duly and properly made.

6. Petitioner shows that at the rear of said tender on said locomotive there is a sheet iron flange that extends up above the top thereof at an angle of about sixty degrees. The ladder on the rear of said tender does not come up and over the top of said flange, so that a person going from the top of said tender over said flange and down onto said ladder has *any* hand hold or other thing to securely hold himself, except to clamp his hands on this sheet iron flange.

7. Petitioner shows that just as he was in the act of climbing over the rear of said tender, and while in full view of the engineer in charge of said locomotive, H. T. Flood, the said engineer, put said locomotive in motion, and before petitioner could turn on said ladder and securely brace and hold himself thereon, and before he could reach his final destination, which was the ladder on the side of said tank, said engineer had said engine in motion and by a sudden, unusual and unnecessary jerk of said engine petitioner was suddenly thrown to the ground and said locomotive was backed over him.

8. Petitioner shows that he had presence of mind to grab one of the rods or axles passing over him and hold fast to the same in order to avoid being killed and mangled and mutilated under said engine. But notwithstanding this fact, petitioner shows that while he was being dragged under said engine as aforesaid his legs came in contact with the wheels under the tender of said locomotive and both of his legs were mashed off at or just below the knee.

9. Petitioner shows that at the time in question he was in the discharge of his duty, at his post where duty required him to be, and in the exercise of ordinary care and diligence.

10. Petitioner shows that after said injury he was taken in charge [fol. 7] by the officers, agents, and employes of said defendant and was carried to Americus, Georgia, for medical attention, where after the lapse of an unusual and unreasonable time, the surgeons of said railway company gave to him such medical attention as they thought proper, but which was in fact not skillful, and as a result of all of which petitioner suffered additional and unusual and unnecessary physical pains and mental anguish, all of which came near resulting in petitioner's death.

11. Petitioner shows that said Walker D. Hines as director-general as aforesaid, his agents, servants and employes, in said transaction were negligent in all of the particulars herein alleged, and especially:

(a) In failing to furnish petitioner with a reasonably safe place in which to work;

(b) In failing to have machinery and equipment such as was in general use at the time in question;

(c) In failing to have ladder on the rear of said tender extend up to and above the top of said sheet iron flange so that petitioner would have had a hand hold to hold and brace himself at the time in question;

(d) In failing to place a grab iron or hand hold on said sheet iron flange at or near the top of said ladder;

(e) In putting said locomotive in motion while petitioner was endeavoring to climb over said sheet iron flange and down on to said ladder, with petitioner in full view and his dangerous and perilous situation known to the said engineer in charge of said locomotive;

(f) In failing to stop said locomotive when petitioner fell and thereby avoid cutting off his legs.

12. Petitioner was at the time in question in the exercise of ordinary care and diligence and could not by the exercise of ordinary care and diligence have avoided the consequences to himself occasioned by the negligence of said Walker D. Hines as director-general as aforesaid, his agents, servants, and employees in said transaction as aforesaid.

13. Petitioner shows that as a result of said injuries he has suffered excruciating physical pain and mental anguish, and that he will continue so to suffer throughout the remaining years of his life.

14. Petitioner shows that at the time in question he was in good health, twenty-nine years of age, earning \$150 per month, and that his earning capacity would have increased.

15. Petitioner shows that as a result of said injuries he is permanently disabled to work and make money, and that his physical deformity will be a source of mental anguish throughout the remaining years of his life.

16. Petitioner shows that under the transportation act of 1920 the President of the United States has appointed John Barton Payne as agent for the United States Railroad Administration as provided in said act, and that the said John Barton Payne as said agent has been duly and legally substituted in the place of said Walker D. Hines, as director-general, and the said John Barton Payne, agent as aforesaid, is the proper party defendant in this case.

17. Petitioner further shows that as a result of all his injuries he has been damaged in the sum of \$50,000, for the recovery of which he brings this suit against the said defendant, John Barton Payne, director general of railroads of the United States and agent under section 206 of the transportation act of 1920, and prays judgment of the court therefor.

Wherefore, petitioner prays that process do issue directed to the said John Barton Payne as director-general of railroads of the United States and agent under section 206 of the transportation act of 1920,

requiring him to be and appear at the next term of this court to answer petitioner's complaint.

(Signed) Walter Defore & Jas. C. Estes, Petitioner's Attorneys.

[fol. 9] [File endorsement omitted.]

GEORGIA,

Lee County:

In Lee Superior Court, May Term, 1921

A. E. MANRY

v.

JOHN BARTON PAYNE, as Director-General of Railroads of the United States.

Suit for Damages

Demurrer—Filed May 21, 1921

And now comes the defendant in the above stated case at the appearance term thereof and demurs to the petition in said case on the following grounds, to wit:

1. Admitting all of the facts which are properly pleaded said petition sets forth no cause of action against this defendant.

2. Said petition is defective in that it sets forth two separate alleged causes of action, to wit, first, injuries alleged to have been caused by the negligence of the engineer, as set forth specifically in paragraphs 7 and 11, on account of alleged defective equipment as set forth in paragraphs 6 and 11, and secondly, on account of the alleged unskillful medical attention rendered petitioner as set forth specifically in paragraph 10, without setting forth said alleged two causes of action in separate counts with separate paragraphs numbered consecutively.

3. Defendant demurs specially to paragraph 10 and says the same should be stricken.

(a) Because it is irrelevant and does not illustrate any ultimate fact necessary to the alleged cause of action set forth in said petition.

(b) Because the same does not set forth any acts of negligence for which this defendant would be liable under what is known as the employer's liability act of Congress, under which said cause of action is alleged.

(c) Because the same does not set forth what is an unusual and [fol. 10] unreasonable time, as alleged in said paragraph.

(d) Nor does said paragraph state how and in what way the medical attention was not skillful as alleged in said paragraph.

(e) Nor does said paragraph allege how and to what extent petitioner "suffered additional and unusual and unnecessary physical pain and mental anguish," as alleged in said paragraph.

4. Defendant demurs to paragraph 11 and particularly that portion thereof hereinafter referred to and says the same should be stricken, because

(a) The same fails to set forth any acts of negligence;

(b) Sub-division a of said paragraph is defective in failing to allege in what way and how defendant failed to furnish petitioner with a reasonable safe place in which to work.

(c) Sub-division b of said paragraph is defective in that it fails to allege what machinery and equipment defendant failed to furnish which was not in general use at the time in question.

(d) Sub-division C of said paragraph is defective in that the same is not a proper element of liability as against this defendant.

(e) Sub-division d of said paragraph is defective in that it fails to allege what machinery and equipment defendant failed to furnish which was not in general use at the time in question.

(f) Sub-divisions a, b, c, and d, of said paragraph are irrelevant and do not illustrate the ultimate acts of negligence alleged in said paragraph on which said petition is based, to wit, the alleged negligence of the engineer.

(g) Sub-division f, of said paragraph is defective in that no acts of negligence with reference to said facts set out in said sub-division are alleged in said petition, nor does the same illustrate the alleged [fol. 11] cause of action set forth in said petition, to wit, the alleged negligence of the engineer in starting said train and injuring petitioner as set forth in paragraph 7 of the petition, there being no allegation in said paragraph nor in said petition that said engineer knew that said petitioner had fallen off the train.

Wherefore, defendant prays the judgment of the court on each and every ground of this demurrer.

(Signed) R. R. Forrester, Leesburg, Ga.; Pottle & Hofmayer,
Albany, Ga., Defendant's Attorneys.

[File endorsement omitted.]

IN LEE SUPERIOR COURT, MAY TERM, 1921

[Title omitted]

Suit for Damages

ANSWER

Now comes the defendant in the above stated case at the appearance term thereof, subject to its demurrer heretofore filed, and respectfully files this its answer to the petition in said case:

1. Defendant admits paragraphs 2, 3, and 16 of said petition.
2. For lack of information defendant can neither admit nor deny paragraphs 4, 5, 6, 8, 13, 14 and 15 of said petition.
3. Defendant denies paragraphs 1, 7, 9, 10, 11, 12 and 17 of said petition.
4. Further answering defendant shows that at the time set forth in said petition defendant was engaged in interstate commerce in the transportation of its trains from Macon and other places in [fol. 12] Georgia, to Montgomery and other places in Alabama, on what is known as the Montgomery line of the southwestern division of the Central of Georgia Railway Company, and petitioner in said case was engaged in the operation of a train likewise engaged in interstate commerce as herein set forth, and this defendant shows that whatever liability there may be on its part if any is controlled by what is known as the employer's liability act as passed by Congress of the United States approved April 22, 1908, and as amended by Congress in a later act, to wit, April 5, 1910.
5. Further answering this defendant shows that under the terms of said act and under the facts with reference to the injuries complained of by petitioner, that there is no liability upon the part of this defendant to petitioner; that whatever injuries if any he sustained were due to his own negligence or were due to an accident, or were due to one of the ordinary risks assumed by petitioner incidental to the duties which he was employed to perform—in either of which event there is no liability upon the part of this defendant.

Wherefore, having fully answered, defendant prays to be hence dismissed.

(Signed) R. R. Forrester, Leesburg, Ga.; Pottle & Hofmayer,
Albany, Ga., Defendant's Attys.

IN SUPERIOR COURT, MAY TERM, 1921

[Title omitted]

Suit for Damage

AMENDMENT TO PETITION

Now comes the plaintiff in the above stated cause and amends his [fol. 13] original petition in said cause by striking paragraph ten thereof and inserting in lieu thereof the following:

Petitioner shows that after the said injury he was taken in charge by the officers, agents, and employees of said defendant and was carried to Americus, Ga., for medical attention where the surgeons of said defendant gave to him medical attention, and was there-afterwards removed from Americus, Ga., to Macon, Ga., where he remained under the care and attention of defendant's surgeons for several weeks before the wounds healed.

Amends further by striking sub-division "b," paragraph eleven thereof.

(Signed) Walter Defore & Estes, W. G. Martin, Petitioner's Attorneys.

Amendment allowed in open court this 7th day of November, 1921.

(Signed) Z. A. Littlejohn, J. S. C. S. W. C.

GEORGIA,

Lee County:

IN SUPERIOR COURT OF LEE COUNTY

ORDER OVERRULING DEMURRER

Upon an allowance of an amendment this day filed, the within demurrer having been renewed to the petition as amended, it is ordered that the demurrers, both general and special, be and the same are hereby overruled.

In open court, this Nov. 7th, 1921.

(Signed) Z. A. Littlejohn, J. S. C. S. W. C.

[fol. 14] IN LEE SUPERIOR COURT, MAY TERM, 1921

[Title omitted]

Suit for Damages

EXCEPTIONS—Filed Dec. 29, 1921

A demurrer to the original petition in the above stated case coming on to be heard at the November Term, 1921, of Lee superior

court, on November 7, 1921, the plaintiff filed an amendment to the original petition in said cause which was thereupon duly allowed, and the defendant having renewed his demurrer to the petition as amended, the court overruled the demurrers; to which ruling defendant hereby excepts and assigns the same as error and prays that these exceptions be certified by the court and entered on the minutes.

This December 24, 1921.

(Signed) Pottle & Hofmayer, Defendant's Attys.

I hereby certify that the foregoing bill of exceptions is true and that the November term, 1921, of Lee superior court adjourned within less than thirty days from the date of the ruling complained of on November 7, 1921. Let the same, together with this certificate, be entered on the minutes.

This December 26th, 1921.

(Signed) Z. A. Littlejohn, J. S. C., S. W. C.

[File endorsement omitted]

IN SUPERIOR COURT OF LEE COUNTY

VERDICT

We the jury find in favor of the plaintiff seven thousand five hundred (\$7,500.00) dollars.

May 2nd, 1922.

(Signed) S. J. Yoemans, Foreman.

[fol. 15] IN LEE SUPERIOR COURT, MAY TERM, 1921

[Title omitted]

JUDGMENT

The jury having duly returned into open court their verdict in favor of the plaintiff for \$7500, it is thereupon considered, ordered and adjudged by the court that the plaintiff, A. E. Manry, do have and recover of the defendant Jas. C. Davis, as director-general of railroads of the United States and agent under section 206 of the transportation act of 1920, said sum of seven thousand, five hundred dollars and also the sum of \$——as costs of court in this case to be taxed by the clerk of this court.

Judgment signed in open court this 2nd day of May, 1922.

(Signed) Z. A. Littlejohn, J. S. C. S. W. C. W. G. Martin,
Walter Defore, & Jas. C. Estes, Plaintiff's Attys.

IN LEE SUPERIOR COURT, MAY TERM, 1921

[Title omitted]

MOTION FOR NEW TRIAL—Filed May 2, 1922

Verdict and judgment for plaintiff at May term, 1922, of Lee superior court on 2nd day of — 192—.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of the court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds, to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

[fol. 16] 2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

R. R. Forrester, Pottle & Hofmayer, Attorneys for Movant.

IN LEE SUPERIOR COURT

ORDER TO SHOW CAUSE

Read and considered. It is ordered that the plaintiff A. E. Manry, show cause before me, at Americus, Ga., at 2:30 p. m. o'clock, on the 8th day of July, 1922, why the foregoing motion should not be granted. It is further ordered that the plaintiff be served with a copy of this motion and order; and that this order act as a supersedeas until a further order of the court. This 2nd day of May, 1922.

Z. A. Littlejohn, Judge of Superior Court of S. W. C.

LEE SUPERIOR COURT

[Title omitted]

ORDER SETTING MOTION FOR HEARING

The defendant having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony in said case before ad-

journalment of court: It is ordered by the court that said motion be heard and determined on the 8th day of July, 1922, in vacation at [fol. 17] Americus, Ga., at 2:30 p. m., and that movant may amend said motion at any time before the final hearing.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined.

This 2nd day of May, 1922.

Z. A. Littlejohn, Judge of Superior Court of S. W. C.

Due and legal service of the within motion and order acknowledged, time, copy, and all other and further service waived. This 2nd day of May, 1922.

W. G. Martin, Walter Defore, Jas. C. Estes, Attorney- for A. E. Manry, Plaintiff.

(Recorded in Book Min. J. page 263-4, this 7th day of June, 1922. Jewell Wallace, Dep. Clerk.

[fol. 18] [File endorsement omitted.]

[fol. 19] IN LEE SUPERIOR COURT, MAY TERM, 1922

[Title omitted]

Brief of Evidence

A. E. MANRY, plaintiff, being sworn in his own behalf, testified:

Direct examination:

My name is A. E. Manry. I am the plaintiff in this case. On the 29th day of January, 1920, I was employed by the Central of Georgia Railroad, which was being operated at that time under

government control. I was baggage master, running between Macon, Ga. and Montgomery Ala. On this particular day I was employed in the service of that company, and that of the director general of railroads. On the 29th of January, 1920, on train No. 11 at Smithville, I proceeded to do the duties that were always done there. At the time I was coaling the engine, and started over the back of the tender to make the coupling, and as I felt for the ladder a sudden start and jerk of the engine threw me off my balance and caused me to fall between the rails of the track and my legs at the outside. I reached for the drawhead, trying to save myself, missed it, and jerked my head in to keep it off the rails, and locked my hands around the axle of the wheel. At the time I could feel the wheel as it went over my legs. Dug me forty feet before the engine stopped after my leg was cut off. I started the run from Macon that morning, left Macon central time 2:40 or 50. This accident happened at Smithville at six o'clock. I was then running from Macon to Montgomery, Ala. and this injury occurred to me in Smithville, Lee County, Ga. I had been with the engine to the coal chute, which is about 150 or 200 yards from the station. The engine was carried to the coal chute to get coal, to go on to Montgomery. I had been on this run, off and on, for the last nine years; regular since 1917. I had assisted the train crew in coaling the engine at [fol. 20] Smithville, off and on all the time I was on the run. Conductor C. S. Smith had charge of the train, and ordering and directing the work of the train crew. Conductor Smith told me, relative to assisting the engine crew in recoaling the engine at Smithville, account of the porter having to be at the rear end of the train to cut off the sleepers for Albany and Thomasville, and as we pulled into the station we had the crossing blocked,—public highway crossing blocked, to help do anything—coal the engine, get water, throw switches or anything else that came to hand. There was no specific duty laid out for any man on the train. While I was assisting in coaling the engine, the porter had gone back to the rear end of the train to cut off the sleepers going to Albany and Thomasville, and after our train was cut off and left them, he stayed back there to assist the Albany train to make the coupling; then he came on down to be ready to make the transfer of mail, baggage and express. The engine of the Albany train was doing the switching for him while our engine was at the coal chute. That train run from Smithville to Albany and to Flovalla and Lockhart. It was engine No. 1616. The engineer, fireman and myself had got enough coal, and we had all got off on to the tender, the engineer and fireman going into the cab, and myself going over the back of the tender to go down the ladder. Just as I got to the back and had stepped down, which was in an awkward position, having nothing to hold on to but the rim of the tender, and I had hold of it, and fixing to turn and go down the ladder, a sudden start of the engine overbalanced me and threw me off, causing me to fall. As to how far I was from the engineer, those tanks are about 30 feet, I think. It was just breaking day, and a cold, drizzly, foggy, rainy morning. He was running the engine backward. In running an engine backward, the engi-

neer is supposed to be looking backwards in the direction he is going, and to connect the engine to the mail car we had to back up at [fol. 21] Smithville. It was my duty to make the coupling between the engine and the mail car. In order for me to make the coupling in between the engine and this mail car, I had to go on the side of the tank-back end—to be in position where I could give the engineer signals and to see that my drawhead was set in position to make the coupling. At the time I was thrown off the back end of the engine, I was going down to get on the side and be in a position to make the coupling when the engine got up there. I know what a grab iron is. There was not one on the top of this tender. There was not one anywhere near the top of the ladder. The ladder on the back end of the tender is an iron ladder coming up to about eight or ten inches of the top, lacking that much of coming to the top of the tender, then down to the bottom of the tender. It is put there to go up and down on; to be used by employees in going up and down from the tender. Engine No. 1616 had a flange on the top of rim of the tender, which I judge to be about 6 or 8 inches in height above the top of the tender. The flange is made of solid sheet iron. That morning there was a sudden start to the engine. There was nothing attached to the engine, wasn't anything but the engine and tender. At that time I had been railroading nine years. I was accustomed to the starting and stopping of engines, and was accustomed seeing and by experience, to the starting of a naked engine. I mean by sudden jerk, that the engine was suddenly started, not slow, but as if started off suddenly without easing off—like you would pull the throttle open and cause the engine to kinder lunge backward. In railroad terms we mean by "lunging backward", a sudden start—just a sudden start of the engine. That overbalanced me and threw me off my balance. I only had the rim of the tender to hold on to. I said the engine dragged me about 30 or 40 feet. When they got me out I told them to get something to bind my legs up so I wouldn't bleed to death, and they pulled out handkerchiefs (several men did—I do not know all who were around [fol. 22] me) and started to tying them up, and somebody told them to go to the baggage car and get the first aid kit which they carried, so they brought that there and got a roll of bandage out of the kit and bound my legs up and cut off the bleeding, and which were bound up before the reaction took place. That took place about ten minutes after my legs were cut off, had got them tied up. They put me on train No. 8, going to Macon from Albany and carried me to Americus. I had not seen any doctor or anyone. I got to Americus about seven o'clock a. m., 7:30 at the hospital. They had no conveyance or anything to take me to the hospital with, which they said they had wired for, and the only thing they could get was an express wagon—big two horse express wagon. They put me in this and started with me. I was in such pain until I couldn't stand it and I told the driver not to take me any further with it. About that time Mr. Anderson, the agent, somebody had 'phoned him and he came up and wanted to know about it. I told him, Mr. Anderson

for goodness sake get something to take me to the hospital in, I can't stand this, it's too rough; it's like riding across a plowed field in a wagon. After getting me to the hospital they carried me in the operating room and gave me a shot of morphine. Well I got one while I was waiting to get a truck to take me to the hospital, it was then they gave me the first shot of morphine. So they put me down in the operating room, and they had a doctor there by the name of Dr. Glenn, who was going to assist Dr. Lewis in doing the operation, and Dr. Lewis told him to go to breakfast now, and he came back I will do it. I judge the time was about nine o'clock when they put me on the operating table, and I was lying on the operating table all this time. Well, about 2:15 I waked from the ether and I was very weak and had lost a great deal of blood, and I was suffering awfully at that time. I waked about 2:15, somewhere along in there, [fol. 23] in the afternoon, and I suffered from then on for four weeks terribly. I remained at the hospital in Americus from January 29th until February 5, 1920. I was then transferred to the Macon hospital at my request. I sent my wife to Macon and had asked the doctors there to transfer me to Macon and they wouldn't do it, so I sends my wife to Macon to see Supt. Balwin and ask him why I couldn't be transferred to the Macon hospital and Dr. Rozar. After my wife left on that mission, I went to the Macon hospital—she left on Friday and I on Sunday. When I arrived at the Macon hospital Dr. Rozar took charge of me. Dr. Rozar is physician for the Central of Georgia Ry. in Macon. When I got to the hospital I told Dr. Rozar that my left leg was in bad condition and I wanted him to see it and he dressed it about seven o'clock and there was a hole in it about 3 inches deep, where the flesh and stuff had been cut out at Americus. They cut the flesh. I did not see the flesh only on one occasion. I saw the hole where the flesh was cut out, and my leg would bleed and the blood would trickle down on the bed. After that experience—to start at Americus before the cutting was done. On the day, which was Monday the 9th or 10th of February, the stitches were taken out and I was told that I could get up. Well, after talking with Dr. Lewis I sat up in a rolling chair after the stitches were taken out, and in getting up the end of my leg bursted. I suffered pain from my leg bursting, because my leg pained me a good deal, and after cutting on it the pain was awfully severe. It was a few days after that when I was transferred to Macon. I arrived at Macon on February 15th and my leg was dressed about 7 o'clock by Dr. Rozar. I saw my leg before Dr. Rozar treated it, and saw it afterwards also. He worked on it that night—dressed it on Sunday night, and on Tuesday morning he came back and cut the stitches out of it and dressed it and begun pouring balsam of Peru in this hole three inches deep, and he continued that treatment on [fol. 24] until I was sent home about four weeks afterwards. There were no stitches or cutting done by Dr. Rozar after my arrival at Macon hospital, only he took these stitches out that had been put in there by Dr. Lewis. I remained in the Macon hospital about four weeks and then went home. As to how long I was confined at home before I could get out, the only means I had of getting about was

in a rolling chair, which lasted up until I got my artificial legs, which was on June 1, 1920. As to how I suffered, as near as I can tell you, those four weeks I suffered different kinds of pain, and all the pains I had felt like they were in my feet and in every bone. I had one of the most severe pains that felt as if I had stuck my feet in the fire. It would not have burned a bit more than mine did, and it burned me that way for four weeks continuously. Another pain was like you would take a rope or wire and twist it around your foot and try to turn it that way tight. Pains at my heel felt that way, and another was like shocks of electricity hit me about every three to five minutes, and knocked my legs straight up every time they hit me. After four weeks the pain subsided, was not so severe. I had pains afterwards and do now have some pains in my legs every day, and in the summer time in walking I get hot and it's like walking on pins for me to walk on the artificial legs. I have suffered great anguish, and they get red from scalding, and it's hard for me to get about, and I have to spend money to get medicine to heal them up and everything. I could not continue my employment in railroad work. (Witness moved chair over where the jury could have full view of his legs.) There is the end of my leg 4 inches from the knee cap to the end of it. I can't let my sock down and show it it's an artificial leg and I only could take it off. Below the knee joint it is four inches on my right leg and six inches on my left [fol. 25] leg. The stub goes down in that artificial leg about six inches below the knee joint on the left side. I have a leather corset that's worn up here (indicating) and the straps have to roll over my shoulders in order to carry this big leather corset this long (indicating) and two heavy woolen socks have to be worn on them. You can take those socks and fill them up with water and they will hold all of it, it won't leak through. They are special wool and made specially for the purpose, and I wear them summer and winter, and as no air can get in they scald my legs in summer time. I am now doing bookkeeping work for the Macon hospital. I do that sitting down. I could not carry on work which would require standing on my feet, not for any length of time. After standing on my feet for any length of time they get dead, feel dead, and I have to sit down, because I am unable to walk until I sit down and get the blood to circulating through my legs. It causes a poor circulation of the blood. No signal was given by the engineer at the time he started the engine that morning and threw me off. I was 29 years old at that time, and making approximately \$1,800 per year, \$150 per month. I make \$100 a month now. I couldn't get regular employment on account of my condition for 18 months— from January, 1920 until July, 1921, before I could get any employment, on account of my condition. I said I am now making \$100 per month.— have only been getting \$100 per month since January. From July to January I got \$75 per month. At that time I weighed 192 pounds. My health was good prior to this injury—had never had serious illness of any kind. I worked regularly. During the time I was employed by the railroad company, I never lost any time

except for sickness in my family. I never lost any time on account of sickness of myself. I didn't have any reprimands for violation of rules or inattention to business, or failure to look after the company's property and my duties, and I worked for them nine years. [fol. 26] A man is promoted from baggage man to conductor. Conductors make, on an average—where a man had a regular run, he would make \$200 per month at that time. A man is promoted from baggage man to conductor of a freight train. As to what qualifications I have for holding down a higher job in railroad service—relative to education, etc.—I have a high school education. That is sufficient to enable me to hold down a higher job in railroad service. Part of the train I was on that morning went to Albany, Ga., and part to Montgomery, Ala. It was my run on this same train from Macon, Ga. to Montgomery, Ala. As to what there was between me and the engineer when I was standing on that tender fixing to get down—to obstruct his view and keep him from seeing me—there was coal and wood-work that comes up there to hold the coal on the tender. As to whether it was higher than my head, not standing on top of the tender. When I was standing on the top of the tender and going to the back end, there was not a thing to keep the engineer from seeing me. He could see over the coal and see me on the back end of the tender, after I stepped down why I was out of his sight. The engineer got down off the coal chute with me on to the engine at the time I got down. He went to his place in the cab and I went to the back end of the tender. I was making a run from Macon, Ga., to Montgomery, Ala., and would have gone on to Montgomery had it not been for the injury that I received at Smithville. Prior to running with Capt. Smith as conductor, I ran with E. R. Layfield, conductor. While I was running with Layfield, I assisted in coaling the engine—performed practically the same duties that I was performing at the time I was injured. I didn't run with Capt. Layfield in the service for 9 years, I ran with different conductors. Capt. Layfield was relieved by conductor Smith.

[fol. 27] Cross-examination:

The same engine that started from Macon, Ga., went to Montgomery, Ala. I had been performing the same duties that I was performing that morning, off and on in the nine years and whenever I was on that Montgomery run—I had been on this run regularly since 1917. As to how often I had used this same engine on those runs, we caught this engine every fifteen days. They had three engine crews on the same run, and it would take us 15 days. They had five conductors and baggage masters, and it would throw us to catch the engineer every fifteen days—this same engine on every fifteenth trip. In other words, about twice a month I would use this same particular engine—and at other times I would use engines that were built in the same way, and the same type of ladder and same tender and all. I was familiar with the construction of the ladder, as well as the flange and everything about that part of the tender

and engine. When the accident occurred, I was turning to get on to the ladder—I had one foot on the top round of the ladder. I don't remember which foot. I was perfectly conscious and rational a minute after this thing happened. I was rational and conscious in Macon at the hospital, so far as my mental faculties were concerned. That is my signature, made March 4, 1920, as an affidavit of my loss of limbs. That signature was made before a notary public in Macon. That is the same signature that is on the back of this cancelled check. That is my signature, "A. E. Manry, witnessed by D. M. Saunders and J. C. Bartley."

R. R. WAGNER, sworn in behalf of plaintiff, testified:

Direct examination:

I am an uncle of Mr. Manry. I visited him at the time he received his injury in January 1920. It was about 20 hours, I suppose, after his injury when I saw him. He was then in the hospital at Americus. I remained with him at that time several months—I [fol. 28] saw treatment of his wounds during that time, and saw the condition of his wounds. I saw the doctors dress it time after time—I won't say I saw it every time, but I think it was about ten days that I saw them dress it, and when it showed up so bad and the pus just poured out in a stream, the doctor would catch it, that fleshy part under there, raise it up and the pus would pour out of it. Mr. Manry looked like he was suffering a whole lot from those wounds. He complained about his suffering and asked to be removed to the Macon hospital. I was with him quite a bit at the Macon hospital, practically every day he was there. There was about three days that I did not go to the hospital while he was there—I left him and went to Birmingham and was gone three days, came right back. That was about the only days I missed going to the hospital to see him while he was in there. I did not see them remove any flesh from his leg at Macon. I saw his leg before any was removed and after it was removed, but in Macon I did not see any removed at all. It was about four months before he tried to put on the artificial feet—I went to Atlanta with him to put them on—about four months, I wouldn't say just exactly the date. I have known Mr. Manry all of his life; I went for the doctor when he was born. I don't know as he has had any serious illness during his life, he was in sound health prior to this accident.

(No questions by the defendant.)

Plaintiff rests.

Dr. TAYLOR LEWIS, sworn in behalf of defendant, testified:

Direct examination:

I am a physician and surgeon and reside in Americus. At the time of this particular accident, I was representing the director general of railroads at Americus, Ga. as surgeon. This plaintiff did not suffer any more pain than is usually incident to a case of this kind and where a man's legs are cut off. Everything was done to make [fol. 29] him comfortable as possible, and to do to make a patient who had an unquestionable serious accident like his. The reason why I did not perform an operation immediately upon his arrival at Americus was, as soon as Mr. Manry arrived at the station I examined him to see what his condition was. I found that somebody had administered what you might term first aid treatment; that is, they bound his legs. We took him to the hospital as soon as possible, and I gave him a hypodermic before he got out there. As a matter of fact, we don't have an ambulance, and we carried him there the best way possible, and got him there as soon as possible. We found him suffering shock to such a degree that it was certainly not feasible to operate on him at that time, because, had we done so, he would not be alive and here today. When a person has both legs crushed the shock is terrific and you have got to wait until reaction takes place, whether it's fifteen minutes or fifteen hours. You have got to wait until his condition is such that he can stand the operation, and that is why we were waiting, and we were treating him vigorously for the shock, during that time. As a matter of fact, there was from one to two nurses and one doctor with him all that period of time. He arrived in Americus something like seven o'clock, I guess it was, and we operated on him probably between nine and eleven, and it required that much time to give him an opportunity to react so that we could operate at all. As I say, had we not waited with him, he would not be here alive today. There was nothing during the course of treatment there while in my charge that caused him any unusual pain and suffering. In brief as to what I did on the occasion: I was telephoned early in the morning before breakfast, between six and seven o'clock, of the accident, and realizing the seriousness of the situation, I immediately telephoned the superintendent of the hospital to have a room ready for Mr. Manry; and also to have the operating room ready to operate. I then telephoned Dr. Glenn and Dr. Stukes, both fellow practitioners who [fol. 30] lived in Americus, and asked them to assist me,—and only a few minutes to do all this in, because by the time I got through with the telephone messages and could get to the depot the train was there. We took Mr. Manry, in the best way we had to get him there, to the hospital, and finding him suffering such severe shock we had to wait a couple of hours before operating. He was not put under the anesthetic until necessary, but you see it takes anywhere from five to thirty minutes to get a man under the influence of ether. You don't put him under there in a minute's time, and you have to get him completely under the influence of ether before the operation;

so it takes a certain amount of time. And it is necessary to clean up for an operation when a man has both legs crushed and been dragged in the soot, dust and dirt, and cinders. He is very dirty, all over and it takes time to clean him up thoroughly and get ready for an operation. We operated on Mr. Manry as quickly as possible, and did the best operation it was possible to do. The fact that he is alive today is evidence that he certainly must have received proper treatment. I say this in answer to his statements, and it shows that he had proper treatment in the amputation. I will explain to the jury, in view of Mr. Manry's testimony, certain conditions of this wound and what had to be done: Whenever you have a surgical case of this character you have got two things to keep in mind. The first is to save the life of your patient. The second is to give the patient the very best stump that is possible with the conditions that you encounter or have to deal with. Now, as I say, the fact that he is living, is evidence that we saved his life. Now as to the method, the things that I had in mind and which were carried out, to give him as good stumps as possible, was this. You don't want to amputate too high if you can help it, so you can give him a leverage there that he can manipulate an artificial limb better. I could have amputated the limb higher up. I will speak about the other first. One leg healed up promptly. The tissues were sewed together and the skin was sewed together after the bone had been sawed off and the blood vessels tied, and then the union took place immediately and directly because we were dealing with sound tissues, tissues that hadn't been injured and bruised, so it healed immediately. The other leg could have been made to do the same thing provided I had amputated a little higher up, two or three inches higher up, but had I amputated a little higher, he would not have had as useful legs. Therefore, I amputated a little lower, and included some bruised tissues, hoping that the bruised tissues might have enough vitality about it to survive. I mean to say, to have enough vitality to regain its normal condition, and if it didn't why the thing for it to do was to slough out and, of course, if it sloughs it takes longer to heal, two or three weeks longer. In doing that you give the patient very much better stump than if amputated higher. As a matter of fact, when you sew up that bruised tissue if the tissue has enough vitality left so that it will renew its growth, why you have a union same as you would in any other tissue; but if that tissue has been bruised to that extent that the blood supply is cut off from it, as a matter of fact it sloughs out and when it sloughs out you got to clean out that wound. Now, am I permitted to explain what he calls his "leg bursting"? It was simply this: I had sewed through these bruised tissues, and one corner you must remember in his leg, just one corner that way—three-quarters of that stump had healed up perfectly well; and at one corner where I had used a little bruised tissue, it did slough—now: This bursting was not unexpected at all—in fact it was. What he calls his bursting was simply a tearing out of the stitches in that bruised tissue, and it was a thing that I rather expected to happen, because I knew that it included that bruised tissue; but, as I say, it was better to do that and give him a

better stump, and take a longer time to heal, than to amputate two or three inches higher and give him a less useful stump, I think anybody will agree to that point. Now, to show you that everything possible was done to alleviate his suffering, I even went to the extent of asking the superintendent of the hospital to let him name his own private nurse (they have a house rule at the hospital of not allowing outside nurses in) and he was allowed to name his own private nurse, that is a nurse there, a relative or friend of his from Macon to come and act as his nurse. When I refer to giving him a better stump, I mean a stump that an artificial limb could be used more serviceably on.

Cross-examination :

I testified that Mr. Manry did suffer from a severe shock and the shock was so great that I had to wait about a couple of hours for the reaction to take place. Any man with both of his legs crushed off at the same time would suffer a very severe shock, and Mr. Manry suffered quite as much as the usual or raverage case—same thing. That suffering is intense and very severe—he is bound to suffer, there is no way to avoid it. You can alleviate it as much as you can, but there is no way that you can do away with all of it. Well, yes, it continues for some time, he has more or less discomfort sometimes. He does not suffer severe pain all the time.

H. T. Flood, sworn in behalf of defendant, testified :

My name is H. T. Flood, I live in Macon, Ga. I am now employed by the Central of Georgia Ry. I was in the employ of the director general of railroads on January 29, 1920, as locomotive engineer. I had been engineer on the Central of Ga. Ry. about 8½ [fol. 33] years. I was in charge of this particular engine on the morning of this accident to Mr. Manry—engine No. 1616. I had started from Macon, Ga. and was going to Montgomery, Ala. I left Macon at 2:40 a. m. on time. I arrived in Smithville about 5:40 a. m. When we arrived in Smithville, we had a little switching to do, and got water after we done part of the switching, went down to clean the fire, and then come back to the coal chute to get coal. When I came up after cleaning the fire in the engine, to the coal chute, Mr. Manry and the fireman George Jinks were at the coal chute. When I got to the coal chute, Mr. Manry got upon the engine and got upon the coal chute and helped dump buckets of coal over into the tender. If I am not mitaken he got up in the cab, and got upon the engine that way. Then he got on to the tender of the engine and from the tender got on to the coal chute. I don't remember how many dumps of coal we put on, but we did put some coal on to the tender of the engine. When we got through getting coal, Mr. Manry stepped off of the coal chute on top of the tender. When I was standing at the coal chute and before I started to move

the engine, the rear of the tender was facing the station; she was headed west. As to what then happened, the fireman and Mr. Manry both got down on the tender on the coal, the fireman got down in the cab and Mr. Manry started over the back of the tender up on top, and told me to back up. He had his lantern in his hand as he went toward the back of the tender—I suppose to get down the ladder. He just says “back up” and commenced moving his light—moving it just this way (indicating). That movement in railroad signals indicated “back up.” Mr. Manry gave me the back-up signal with his lantern in addition to telling me to back up—while he was on the back of the tender and after he had stepped off the coal chute—then as he started toward the rear of the tender he gave me the signal with his lantern. I suppose there was about [fol. 34] a foot and a half or two foot of coal above the flare of the tender—top of the tender. That is a correct photograph of engine No. 1616 that I had in charge that morning. I am familiar with the location around Smithville. That photograph is a correct position of it going east, and a correct photograph of the coal chute. That represents a train going east, as I come in toward the coal chute going toward Macon, and that is a closer view of the chute looking east, toward the station. Well, I would say that represents the height of the coal on that tender on the date of this injury, might have been a little lower there, but I would say that is about the height of it. The height of the tender from the sill up is about six and a half feet. That was right down here. The coal was about two feet higher, making about eight feet. I should judge Mr. Manry was about five feet five, something like that, maybe six. When he had gotten to the top of this coal, he was going in the direction of the rear of the tender. As to whether I could see him entirely throughout this time, you see how much lower I am down there in the cab than he would be up here, and when he got to the back of the tender I couldn't see but very little of him, probably the top of his head. When he got back of the coal, I could only see his head there. I was here in the cab of the engine, on the right hand side. After Mr. Manry gave me the back-up signal, I started to back up—I started by releasing my brakes and giving the engine a little steam. I did not throw the throttle wide open—I started it in the usual manner—slowly. I started the engine from the coal chute, when I released by brakes, very lightly, and started moving back slowly. I heard somebody holler. At that time I was going about three miles an hour, and when I heard the first holler, I was going about three miles an hour. There is a step on the right hand [fol. 35] side of the engine as you get in the cab, same as there is on the left hand side—it is the same thing on both sides. If Mr. Manry had so desired he could have gotten on to the engine and gotten down by that step easier than he could by the rear on that ladder. I know of no reason why he should not have gotten off the engine by the step instead of going to the rear of the tender—there was no defect in the step whatever. As to whether or not it was his duty to make the coupling to the mail car when I backed up, that

is out of my jurisdiction; that's up to the train crew, I think. The last thing I saw of Mr. Manry after he come back of the coal, was the top of his head when he stooped down. That was the last I saw of him; I saw nothing more of him. So far as I could see, he might have been on the rear of the ladder or rear of the tank,—he could have been sitting down on top of the tank—I couldn't see him. I did not know that he was on that ladder, I couldn't swear that he was on the ladder. At that time when I last saw Mr. Manry, the engine had already started to move backwards in response to his signal to me. I was backing up to couple to my train which was left at the station. I don't know how far I had gone when I heard some one holler, I didn't measure it, but I suppose somewhere about 90 or 95 feet, something like that; I didn't know at first what it was—first time I heard it I thought somebody around there was hollering, but I didn't catch it clearly,—then I heard him again. There was an interval of three or four seconds, I suppose, between the two hollers I heard. I then applied my brakes on my engine, jumped off and run back of the tender where I heard the sound. My engine stopped right immediately after I applied the brakes, time straight air was applied direct from the main reservoir. My brakes were in good condition. After the accident, I looked at the back of the tender and all, and everything was in [fol. 36] place. I saw nothing loose. A little later during that morning I made an examination for the purpose of ascertaining if there was anything loose. I did not discover anything at all that was loose or out of place in any way. From the time I left that coal chute until the time I applied my brakes and stopped, there was no jerk in connection with the movement of that engine. I say that because there could be no jerk at a speed of 3 miles per hour; there is no slack between the engine and tender. You take a locomotive with cars where there is slack between them anywhere from two to six inches and such as that, when you apply your brakes the slack is going to run out or in, one, and that will cause a jerk of the train and engine, also. Now where there are no cars attached, there will be no jerk if you run it at moderate speed, as there is no slack between the engine and tender, so that there will be no jerk. There was no slack between this particular engine and tender on that morning. There was no elevation, kinder on a curve and a little bit upgrade—very little though. That is the coupler-drawhead. A chain connects that coupling with this iron rod going in that direct-on at the bottom of the engine. That chain comes down on this side of this. That is a buffer to keep the slack out between the engine and cars, and there is a spring in behind there to take up the slack. This chain goes back of the buffer into this knuckle here, and it is connected to a lock pin and this rod. That rod, connected to this chain, is used to open the knuckle and keep them from going in between the cars. When you want to connect this engine with the cars, you pull this rod up, right on the right or left hand side. That is connected with the chain that pulls this knuckle out of the coupling pin—pulls the lock pin up: Then it connects in there automatically. This buffer comes out further than

the tender, some of them three or four inches, maybe a little more. That piece of timber in there projects back of the tender about two [fol. 37] and a half inches. That rod is about an inch or an inch and a half, or probably two inches, from the tender—not over that. That rod is not placed there for the purpose of walking from one side of the engine to the other, it is placed there for opening and closing the knuckle without going in between the cars. That rod is an inch and a quarter, iron. This rod is not to be used for the purpose of passing from one side of the engine to the other. There is a step on the left hand side of this engine from the rear, on the same side that the ladder is. If one descended at the rear of this tender from the ladder and wanted to get to the ground, he could step right on to this step right here without crossing over to this side. When I stopped the engine and went to Mr. Manry, I found him on the left hand side, part of him under the tender. He had hold of the left safety chain with both hands. Here is this safety chain, one on the left and one on the right, and this is the one he had hold of with his hands. His feet were pointed this way—under this, the left back pair of trucks. At that time when I saw him his feet had been severed. When I started to backing the bell on the engine was ringing—ringing automatically by air. I started it, as soon as I started to backing, by opening a little air valve. When I was backing I was looking back on my side, which was the right hand side—I was looking east,—was backing east and I was looking east. I was looking in the direction in which I was going—looking out of the cab window.

Cross-examination :

At the time this accident happened I had nothing but the engine. The train I was taking to Montgomery had six or seven coaches—I think I had two Pullmans. No, that was not a reasonably heavy train for an engine of the 1616 type. My engine does not start off much more rapidly when not connected with a string of cars, it depends upon how much steam you give it. In handling a heavy train [fol. 38] of cars, you have to be more careful in starting your engine than if you have only the naked engine. When I referred a moment ago to the left side of the engine, I mean the left side when standing on the rear of the engine and looking in the direction in which the engine was headed. That is what I mean when I said Mr. Manry had hold of the safety chain on the left side. This photograph shows the ladder at the left of the tender on the left side, and the ladder is on the back of the tender immediately over the place where this safety chain (I was talking about) was located. When you undertake to make a coupling with an automatic coupler and the knuckle is placed in position, it is necessary to lift the pin so as to release the knuckle and let it swing out, so that when the other coupler comes in contact with it, they will unite and push the knuckle back into position, and let the pin then drop down that holds the knuckle in position. And you cannot make a coupling with an automatic coupler except by getting your couplings in that posi-

tion—not without opening one or the other knuckles. In order to open that knuckle it is necessary to lift the pin. If you are coupling from the tender, in order to lift the pin, you have got to be at the rear of the tender which you expect to couple to the other car. If you are coupling two cars, you would be in front or behind the car in that event,—you have to be at the place where the coupling is being made, and it has to be in that position. I knew when I opened the engine that I was going back to couple on to the train. As to whether I knew that Mr. Manry was going back there to make that coupling, I was about a hundred and fifty feet from the train, no sir. I did not know when Mr. Manry started back over the tender that he was going back there for the purpose of adjusting the coupling so I could make my coupling there. All I knew was that he went back over the tender, and I didn't know whether he stopped on the tender or not. I supposed that Mr. Manry, or someone else would [fol. 39] have to make the coupling when I got the engine to where the train was. I did not know he was going to make it, I am no mind reader—I did not know he was going back there for the purpose of putting in place and adjusting so as to make that coupling, I did not know whether he would make the coupling or not. As to whether, every day when I came down on that run, I made that coupling there that same way, when I got a signal I did. Mr. Manry was one of the train crew there, he was riding on the engine at the time, he was the only one there; and this car I was going to couple to was at the station. The rest of the crew was not setting off sleepers, no one else switching on that train except us. I don't know where the crew was as far as that's concerned. I don't know that the Albany division crew was switching the sleepers for the Albany train. As to whether I mean to say that the Albany train doesn't take sleepers from Smithville to Albany, they get it, but I had cut that sleeper off and had pulled down. The other man backed right up and coupled up to it. I don't know anything about the porter on my train staying up there with the sleeper and coupling it up to the Albany train—the sleeper I set off. I recognize the scenery around Smithville. That picture was made in Macon, I reckon—I couldn't tell you when it was made. The engine was equipped and all, on the morning of the injury, identically and in every detail, as the picture now shows, but I won't say it is the same identical parts and everything, because some of them may have been knocked off, may have backed into something and knocked them off; but it was equipped the same identical way that morning as that picture shows now. That ladder was put there for a man to get up on the tender from the steps, up on top of the tender, but I don't say that it is put there for the train crew. The boys go up there to get water and such as that. It is put there for the employees to get [fol. 40] up there on the back of the tender from the ground, and from the back of the tender back down to the ground. As to whether this ladder going up the rear of the tender on the left hand side in within twelve inches of the ladder on the side of the tender, I don't know just how many inches it is, can't say, not much over 12 or 15

inches. I never measured it and couldn't say. You can adjust the lever that pulls the knuckle pin in an automatic coupler from the left side of the engine as well as from the right side—and the crank that goes across and that's attached to this knuckle pin, goes all the way across the tender and has a crank hand-hold at each end, one on the right side and one on the left side. This rod that runs across the end of the tender extends about an inch and a half or two inches from the rear end of the tender. I mean by that that the rear end of the sill or wall of the tender projects from that on the inside of the road. And this buffer or bumper is approximately two feet in length, and is directly over the automatic coupler, which is in the center of the tender. I don't know exactly how wide across from left to right the tender it—somewhere about 8 feet and 3 or 4 inches, something like that. This small photograph marked "c" on the back shows the switch and frog just above the coal chute at Smithville, and that frog and switch was between my engine, when it started off, and the car to which I was going to. I am still in the employ of the Central of Georgia Ry. The last time I saw Mr. Manry he was on my coal pile, and all I could see was the top of his head, and then that disappeared. I don't know whether he stooped down or got down on the ladder. I don't know whether he was stooped to get on the ladder or not, he was walking over this pile of coal and had his lantern in his hand when I saw him and the engine was in motion before he got to the back of the tender,—he was walking across on this loose coal on top of the tender.

[fol. 41] Redirect examination:

I couldn't say whether that ladder on the rear was purposed to be used while the engine was in motion, I don't suppose it is unless it happens to be a case of emergency. In ordinary use and operation of the train that ladder is not supposed to be used while the engine is in motion. In order to make that coupling, it is always customary really to stop two feet short of the train, to give the crew a chance to adjust the knuckle. In the operation of this connection at Smithville at that time the engine was not stopped prior to making that coupling. To connect the tender with the mail car, ordinarily, we stop before we actually connect with the car,—always on passenger trains. I couldn't say because I couldn't see back of the tender, whether the coupling was not made, the pin not drawn while the tender was in motion. I don't know whether that knuckle was pulled before I stopped or not. My purpose of stopping between there and before I connected the car was in order to give the trainmen a chance to adjust the knuckle—for the purpose of lifting this knuckle if it was not in proper shape.

Recross-examination:

I do not know that ninety per cent of the couplings are made with the engine never stopped, that we come up within so many feet, slow down and roll slowly up to it and the coupling is adjusted and made as we come back together. I say it is a rule for them to stop.

I can't tell what the general practice is with other-, but I know what I do. I mean to say that I roll my engine up to within so many feet of a car to be coupled to, stop and then start again, on passenger trains—not on freight trains. I might, when I get the engine once in motion and under perfect control—with live steam working in my cylinders, roll it up and make the coupling easier and [fol. 42] smoother, than I can to stop and have to start off again in a few feet of the car, but I am not carrying out the rules of instructions of the railroad company when I do it.

GEORGE JINKS, sworn in behalf of defendant, testified:

My name is George Jinks, I live in Macon and am employed by the Central of Georgia Railway. I fire and have been firing on the railroad seven years. I was working on the railroad and fireman on engine 1616 when Mr. Manry got hurt. I was on the tank when the engine got up to the coal chute in Smithville. After the engine got to the coal chute, we, me and Mr. Manry, and the engineer, went up there and got two dumps of coal. After that I come back to the engine and got on the engine, and Mr. Manry stood back there on the tank, waived his lantern and give him the back up signal and then he went to the rear end of the engine and I went to the front. I got on the tank, and went from the tank to the cab—the boiler part. I was on one side and the engineer on the other side of the cab. After Mr. Flood got that signal from Mr. Manry to back up, he knocked the brakes off and eased back, there wasn't any jerk at all on that engine. From the time it was started until it was stopped after somebody hollered, there wasn't any jerk of any kind. About that time I was eating my lunch. Right after I got down off the tank, I reached in the seat box and got my lunch. I had a cup of coffee and just as I started to swallow some, somebody hollered. I looked out the window and got a signal waiving us down, and just as I hollered he stopped the engine and he went down on his side of the engine and I on my side, and we met around the back there together. When I got the signal I set my coffee up on the deck when I picked it up. The contents of that cup of coffee were not knocked out of the cup from the time the engine started until it stopped.

[fol. 43] Cross-examination:

I came down off the coal chute on to the top of the tank, and walked immediately to the fireman's box. I unwrapped the lunch first and then took the cup of coffee off the deck. The deck is a little apron contrivance over the door where I was firing, and the first holler I didn't pay no attention cause I though- it was some children there. The first holler took place before I lifted up the cup of coffee, and that was before I lifted it off the apron. Then I paid no attention until the second holler. Then just as I picked my coffee up I heard the hollering again. I didn't then get down

and go around to the back end of the tender. First, I looked out the window to see what the hollering was and the porter waived us down; that was the first one I saw. I set the cup down immediately the engine stopped and come down on the left hand side of the engine, and Mr. Flood gets off on the right hand side, and we both meets around there. Mr. Flood and I saw him start back to the rear end of the tender. I was a regular man on that run, I been running there two years at that time. That was the first time I had been with Mr. Flood on that run, he was an extra man, I wasn't. That was his first run on that particular schedule. Mr. Flood is a freight train engineer.

KING HARDY, sworn in behalf of defendant, testified:

King Hardy is my name. I was employed by the director-general of railroads on January 29, 1920, as conductor. On that day I was on train No. 15, which goes from Smithville, Ga. to Lockhart, Ala. While at Smithville on this particular day I was making up my train preparing to go to Lockhart. My engine was standing coupled to the train on the side track at Smithville. I don't remember the time, I suppose it was about 6 o'clock. My train was facing west, ready to go towards Albany, toward the Montgomery line, when we [fol. 44] backed out why we were headed towards Albany. The headlight on my engine was shining. The tender on which Mr. Manry was that morning, was facing my engine, east,—my engine was facing towards Albany and the rear of the tender on which Mr. Manry was, was facing toward my engine. The light from my engine was reflected on that tender on which Mr. Manry was. I could see distinctly the movements of Mr. Manry on that occasion. I was standing near the crossing, by my engine,—about 100 yards from the coal chute. I saw the tender and engine on which Mr. Manry was coming toward the crossing. I was flagging the crossing to keep anybody from going over it, and superintending the switching of the cars. When the train comes up there, he cuts the engine off and comes to the coal chute. We swap mail cars there every day. Then they cut the sleeper off on the main line at the switch, and I back down and get it and then pull up in the side track. Had my engine off. He was off and gone to the coal chute to get coal, and I was waiting for him to back up so I could get the mail car off his train and he gets mine, and Mr. Manry had gone to the coal chute with him to get coal. I was standing near my engine waiting for him to come back. He got the coal and jumped off the chute on to the tender, had climbed down the back end and was preparing to get off. By that time the engine prepared to back up. I didn't see him give any signal, and I don't know what caused him to back up; and when Manry started to walk across from one side to the other he fell.

(Here Mr. Hardy is asked to go over before the jury.)

Q. That is the back of the tender?

A. He had gotten off of the coal chute and down on to the tender on this pile of coal and the ladder here, he had come off the tender and come down this ladder to the rod here and had started across from that side to this side; and when he got along about there (indicating) on the photograph he fell off and this wheel here ran over [fol. 45] him. That's the wheel on the left hand side going back, next to the coal chute, and the wheel on the same side the ladder was. He had gotten about midway, right on the left hand side of the buffer there, about that distance. Mr. Manry was walking over the lift rod. That is used in coupling and uncoupling coaches and cars. That pin drops down with a chain on it from that lever down in this thing here and closes, locks the pin and keeps the knuckle locked until you raise that pin. That lever is not used for employees or other parties to walk on. It is supposed to be used only in case of coupling and uncoupling cars. You can operate it from either side of the tender, the right or left, by this handle. The light from my engine was shining on the rear of this tender that Mr. Manry was on, and I could distinctly see what was going on. I should imagine that Mr. Manry had gotten down the ladder and started across the rod when his foot slipped, though I couldn't say, I suppose he slipped off that rod that crosses there. From where I was standing I couldn't tell whether or not there was any jerk. When Mr. Manry fell, I went to where he was and assisted in getting him, up and off to one side and helped to put him on a pile of lumber where they corded his leg to keep him from bleeding. As I saw him fall, I would say his foot slipped, and I think that is what he said. I would say the engine was running at that time about three miles an hour, he had just started. The track there was level. It is the custom to handle transfers at Smithville—trains, tenders and engines, take one off of one train and put it on the other, just as was done that morning. At the time this tender was backed and Mr. Manry was going down the ladder, the engine was in motion,—was going about the same rate of speed it was when he fell off,—probably three or four miles an hour.

Cross-examination:

I was somewhere about 150 yards above the coal chute crossing, [fol. 46] couldn't say positively, I was guarding the crossing,—the track on which this engine was coming. That threw me in direct line with it. I didn't say exactly how fast the train was running, I said three or four miles. Judging from what I could see I would say that he was running 3 or 4 miles. You can tell how fast an engine is backing up, with nothing but the naked engine, if your eyesight was good. It makes no difference if he was coming directly to me.

Redirect examination:

The opinion I gave as to the rate of speed was based upon my experience in observing trains of possibly 25 years. The position I

occupied that morning at Smithville was similar to what I occupied each time I was there at Smithville.

ARTHUR WILLIAMS, sworn in behalf of defendant, testified:

I was employed on the Central Railroad January 29, 1920, when Mr. Manry was hurt. I was working on No. 15 from Smithville to Lockhart, I was on Capt. Hardy's train, was porter. Just before the accident to Mr. Manry I was fixing to go up there and let my man-engineer come out and get a mail car off of No. 11 from Macon. I went on up there, started up there about time the engine began coming back, and stopped at the crossing to protect the crossing. I was at the crossing. Capt. Hardy was about 50 feet from the engine, as I get it, and I was closer to the engine than Mr. Manry got hurt on than he was. As soon as I seen Mr. Manry come down off that coal chute and jump on the tank he started down the ladder, and then when he come down the ladder he missed control of himself and I began to try to stop the engineer—I hollered and tried to stop him with my light and it went out, and I made to the engine. The light was shining from the front of the engine. I saw Mr. Manry when he got down on the ladder, I seen him when he come [fol. 47] down the ladder, he had gotten to the bottom before he fell. He got to the bottom and made an effort to go across to the engineer's side. He was trying to cross on that lift lever rod here, it looked from where I seen him. When I saw him, he had gotten about along in there (indicating on the picture)—somewhere between the ladder and here—that was the way it looked to me. And when I saw him fall, I hollered and tried to wave the engineer down. When he fell, he struck that knuckle, seemed to me, and that knocked him kinder diagonally across the track, and when he fell he hollered once or twice, then that time the tender cut his foots off. There was no special noise or exhaust or anything more than he was backing up, and there was an exhaust from the engine backing up. I didn't see any jerk about the engine at all. The engine was going not under three miles and not over five miles. The train was in motion, backing up, when Mr. Manry was going down that ladder. When I waved my light it went out. I was waving it trying to stop the engineer, and waved it too hard and made it go out. The engineer stopped pretty quick when he got the signal, soon as he saw I was talking to him he stopped right at once.

Cross-examination:

He can stop an engine going at 10 or 15 miles an hour in the distance from you to me. I said I saw Mr. Manry fall against the knuckle, I mean by that the coupler,—this thing right here in the middle—the drawhead. When he fell it seemed like he struck against that knuckle that coupled to the cars. He come down the ladder, goes over the tender and come down the ladder right along here (indicating). When he started across it seemed to me the

distance I was from him, that he got between the ladder and the drawhead—right where that “x” is is the point—and there is where he fell from, and when he fell from that point he struck the coupling, then he went down under that. I am dead certain about that. [fol. 48] I was looking right at him. I was closer to him than Capt. Hardy was,—don’t know exactly how much—I was right in the crossing, guarding it. I know Mr. Saunders. He had me down there before the lawyer, I suppose the other railroad witnesses were there too. He works for the railroad, I reckon. I don’t know, I haven’t ever heard him say. As to whether he was talking railroad business, he just asked me about it; that is all he asked me.

Redirect examination:

As to whether you asked me about what happened and Mr. Saunders did not ask me any questions at all, you asked me to tell you what I know about it. When I saw Mr. Manry fall I was excited, it frightened me pretty bad, all right enough.

Recross:

I didn’t get excited until he started to fall, there was nothing to excite me. Where I put this pencil point was where he was. I wasn’t so excited I don’t know that.

V. S. SMITH, sworn in behalf of defendant, testified:

My name is V. S. Smith. I am now employed by the Central Railroad as conductor. I was in the employ of the director general of railroads in the operation of the Central of Georgia in January, 1920, when Mr. Manry was injured. On that date I was conductor on train No. 11, which starts at Atlanta, goes through Macon and on to Montgomery, Ala. I had passengers for Alabama on that occasion. Mr. H. T. Flood was the engineer on that train. Mr. Manry was baggage master. Twenty minutes is the schedule time to stop at Smithville, to make the transfer with the Albany connection, and for breakfast. On arrival at Smithville and when I first stopped I had to cut off from my train cars on the rear going to Albany, then pulled down in the clear, the other train stopping at [fol. 49] the station and unloading such passengers as I had for the Albany connection at Smithville. I went from there to the train register, registered, and then crossed to the hotel dining room and got my breakfast. I had eight coaches on that train that morning. I was in the dining room at the hotel at Smithville at the time of the accident. I did not see the accident and know nothing about it of my own knowledge. After the accident I examined the end of the tank-tender, ladder and other parts of the rear end of this tender on engine 1616, this was possibly 20 or 30 minutes afterwards. No defects were noted. The track has a curve but there were no defects noted. T’was level grade with a slight elevation for the curvature,

W. A. McCafferty, sworn in behalf of defendant, testified:

My name is W. A. McCafferty. I am employed now by the Central of Ga. Railroad, as assistant master mechanic. I did not occupy this same position on January 28, 1920, I was night round-house foreman at that time. I had charge at that time of all the engines in and out of Macon. I was on engine 1616 on this occasion between eleven thirty and twelve o'clock at night. I made it one of my duties at night to always inspect the engines going to terminals to get trains, and to see if they are supplied with water and coal, and to see if the engine is in condition to go out on the road. That photograph with a cross mark (x) on the back of it, is a correct photograph of engine 1616, as I saw it that night, that's the 1616 tank. The one you marked "y" is a correct photograph also of engine 1616. That photograph marked "m" on the back is the 1622—the same type of engine as the 1616, they are mates. Both of these engines are still used by the Central of Ga. Ry. Co., with the same kind of equipment. This diagram that purports to be marked "end view of tank of engine 1616" at the rear end of the tender [fol. 50] shows the middle ladder. That's what they call the tread, $\frac{5}{8}$ inch in diameter. Running around on this side is a handhold, or grab-iron. That is a sill on the rear end of the tender. From this sill to the top is about $72\frac{3}{4}$ or 73 inches. The distance between these treads, is around 12 to 14 inches, 14 is about it—standard tread of that type. The distance from the rear of the tender to the left hand side is about $10\frac{1}{2}$ or 11 inches. The width between the tread is about 16 inches. That is a correct view of the drawings and measurements on engine 1616. I am familiar with the manner in which these ladders are constructed on the rear of the tenders. I have a book that ought to show the provision applicable for the construction of these side ladders. It is somewhere on this chart. That is the provision. There is no other provision that I know of. The government inspectors have examined these appliances, including this ladder, both before and since this injury. No complaint has been made against the company or the director general during that time that he had the operation of it, that this ladder was not constructed in accordance with the rules of the interstate commerce commission which I have pointed out. The tank proper is more than 48 inches in height, measuring from top of end sill. That is a metal end ladder on this tank or tender. That ladder was securely fastened with bolts or rivets. The thing right there on the rear is the coupling lever or rod. It is used for a man to raise the knuckle lock and uncouple it from the car or whatever it's coupled to. It is not constructed for employees to walk from one side to the other on the rod—it would be unsafe for a man to ascend or descend on it,—or to walk across it from one side to the other, especially while the engine or train was in motion. To get down from this engine tender, a man would come down the ladder on this side at the grab iron and step on to the step. As to whether, if he got on that step he could [fol. 51] then left the lever while he was on the step, they are not supposed to use that lever on the step. These levers are constructed

according to the interstate commerce rule, and a man can raise this without going in between or coming in contact with any part of the tender; that is, in coupling. That can be raised from the right or left, and without going in between. That's what the lever is for, and is put there only for the coupling and uncoupling. It is not for the purpose of being used while the tender is in motion. The fact of the business is, the rear end ladder on the tender is not put there to be used by a man either to descend or ascend that tender while the engine is in motion, but only for emergency causes, or when the engine and tender is being worked on. That's the purpose and application of that ladder. These hand-holds between the tender and the steps are put there for the purpose of ascending and descending the engine. The ladder on engine 1616 and shown on this photograph, as was at that time and is now in general use on the rear of the tender. There is a difference in the construction of ladders on different railroads. Some of them use that ladder on the side of the tender. But the general construction of it is substantially the same as is in general use by other railroads.

Cross-examination :

The ladder is such as is in general use. Some railroads locate them on the side and some on the rear, but the construction is practically the same—made out of substantially the same sized iron, etc. As to whether this tender is 94-1/2 over all, that's from the outside sheets, that's about it, it will run a little different, some will go an inch or two narrower or a little bit fuller. A man couldn't very well unlock that coupling with the engine in motion, unless he was on the ground. As to whether you can adjust your couplers there as well as here, you can raise this lever from one side or the other, but a man on the steps with the engine in motion, would take a chance [fol. 52] in doing that. A man couldn't adjust the coupling standing on the left side of the engine as well as the right. If he was standing he would adjust it better by standing on the right. This lever that comes down on the left is such that a man could adjust the coupling same as the one on the right side. A man could handle it just as easily from one side as he could from the other, but what I want to get right about your question is do you mean for the man to raise this left lever while he is standing on the step, or on the ground.

Q. No, I didn't specify whether the step or ground. That picture of engine 1622 shows a side view. The step is made to come down on the ground, it is not made to stand on and lift that knuckle out. That ladder is placed on the left side so that you can come down that ladder, step on to the steps, on the left hand side, and without any trouble at all you can do that. The ladder here on the back of the tender is 10-1/2 inches from the side of the top, and the steps are immediately on the side, so that the steps on the left side are 12 or 14 inches from the ladder that runs up the rear end. The class of engines from 1614 to 1628 inclusive are the same kind. That's what they call light Pacific type engines. This second class have been superheated and called 20 x 28 Pacific type engines.

Redirect:

I said those engines from 1614 to 1628 type, they have changed the engines and superheated them, that is, they give them increased tractive power and drying out the steam. That is done in the front end of the locomotive and cylinders. That has nothing to do with the rear construction, the tenders. It is not customary, usual or necessary, in the construction of tenders, for this ladder to extend up above the sheet iron flange. It is not necessary to do that. On some of our tenders we have had ladders that didn't come up [fol. 53] to the top or above the tender. It wasn't done because it is not necessary to do that, and didn't use that type of ladder altogether. A ladder that does not come up to the top of the tender would be more safe than one that came up because a man going over the flare of the tender would stumble. It would be just like putting a block over the floor of this platform. As to whether or not there was any grab hold or hand hold on the sheet iron flange at or near the top of the ladder and if not why not—the flange of the tender right above the base of the tender is used for a handhold in going over the side of the tender and top of it. Grab iron is to the left of it and runs above the top of the tender.

In other words there is an iron of some kind that extends over the entire tender of engine 1616 of which a man could grab hold of—that is the flare of the tender. That is the way these engines were operated by the Central Railroad and were equipped at that time. That is practically the same way that tenders are equipped on other railroads and were at that time. Some railroads use different ladders, and some put them on the side of the tender, but most of them are put on the back. It is just a custom of the railroads; but every tender 48 inches high must have some metal suitable ladder on the rear of the tender.

Recross:

Not coming up to the top of the tender. Not necessarily,—well a place to give a man a place where he can get a hold. I don't say that engine 1616 had a ladder of that kind on it before Mr. Manry was hurt. I say that some of the ladders we have had on our tenders did not protrude to the top, I would not say that No. 1616 had that kind of a ladder on it prior to Mr. Manry being injured, I wouldn't swear that the ladder had not been renewed or taken off for some purpose. As to whether, if it were renewed, at any time, it [fol. 54] run over the top of that flange, no, sir. It is not a fact that the Central of Ga. are now running all of those tenders above the top, they build different length ladders, some go to the top, and some just below that. Not in every case where we renew a ladder do we run it over the top of that flange—not on all those big engines. I said I wouldn't say that the ladder on the 1616 engine at the time of Mr. Manry's injury went up to the top of the tender, or just below the top of the tender,—I would say that the ladder on the 1616 was the same as that in the picture, at the time he was injured or fell off the tender. I say that because that photograph was made I think

about November, as near as I can recollect; and that same ladder you see on the tender now, was on there at that time—at the time the photograph was made—and is in the same condition now as when the photograph was made—that is the same ladder. That is what I mean to tell the jury. I recall when 1616 was overhauled, I overhauled her the last time, that was about three or four months ago, I think. She was in the roundhouse at that time. I didn't overhaul her before that time, she was overhauled in the back shop. I know how long we have had those engines. We got them in 1905, July 3rd, and I rebuilt the engine after that. We have a grab iron on the side of the tender, running from the bottom of the tender up to and over the top of the tender, and that same grab iron is on an engine whose ladder does not run over the top. These ladders that do not run up to and over the top, stop about the bottom of the flare,—not 6 or 10 inches below, they will not run over 6 inches. As to whether any of the tenders have grab iron riveted on top of the tender, they have, we run them over the flare. We have rods and flares a good many an inch or two inches, makes a total of six inches, with grab iron to go over that flare, and anchor it down and cause it to hold in place. It is on the flare and it gives service uninterrupted by any other part of the tender. That is not where the ladder goes [fol. 55] over the top of the tender, on all the tenders we don't put any grab irons other than that. As to whether I told the jury that some of the ladders did not go over, I was speaking about the grab irons, I wasn't speaking about ladders. The ladders never come in contact with the top of the tender, they do with the flare. That is independent from the top of the tender, and that is riveted on to the knuckle iron that holds the back section of the tender, in the top of it proper. In order to get this matter clear, the witness goes before the jury: Now the grab iron is on this side, it runs from the bottom of the tender straight up over the top down there, the ladder is on the end of the tender. When I said grab iron just now, I understood you to say grab iron, and I know you know what a grab iron is as well as I do. I may have misunderstood you, if I said that the ladder went over the top of the flare at the time Mr. Manry was injured but did not go over at the time the photograph was made. I thought you asked me if that was the same tender that was on the engine at the time we made the photograph. I misunderstood your question if you asked me if, at the time the injury happened, if we had a ladder running up over the top. I thought you asked me if this was the same photograph, the same tender on the 1616 made at that time of the photograph. It had not been changed since the photograph was made, the engine is exactly like it was at the time the picture was made.

Redirect:

I was up on the engine at eleven thirty or twelve o'clock the night before the injury. At that time the same form of equipment was on it so far as the ladder was concerned. This ladder does extend a little above the tender.

Recross:

I would say that the ladder, at the time Mr. Manry was hurt, didn't [fol. 56] go over the tender but went to the top of the flare.

Redirect:

I mean the ladders go straight up and they are not anchored at that point, they go below right here (indicating). That doesn't go over there at all. That is a straight surface right up this way or the height. It doesn't extend beyond and into the tender. I mean that the ladder was not extended so as to go into the tank, that what I mean, into the flare. I couldn't say that the ladder went above the tender, extended above it prior to and since the injury. I went up on the back of the ladder to inspect the water in the tank. Some of our tenders have ladders down below, about ten to twelve inches below the flare of the tender, or about a reasonable distance to give a man a footing you understand, that is, put his hand on the flare. It didn't go into the tender at all, and I don't say that it wasn't like it is now, I just don't recall about that.

W. A. KLINE, sworn in behalf of defendant, testified:

My name is W. A. Kline. I live in Columbus, Ga. I am now employed by the Central Railroad, as general road foreman of engines. I have examined engine 1616—I couldn't say at what intervals I have examined her—it would be impossible for me to mention the dates because I inspect so many engines that I could not possibly recall any particular date when I did inspect this particular engine. I would say that is a correct photograph of engine 1616. I would suppose it is 48 inches in height from the top of the end sill, the tender, I am not positive about that height. I am familiar with the construction of the ladders on this type of engine, the 1616, used by the Central Railroad, and I am familiar with the rules of the interstate commerce commission with reference to ladders on types of [fol. 57] tenders of that character. The ladder was securely fastened with bolts or rivets. It was a metal ladder.

H. G. CARTER, sworn for defendant, testified:

My name is H. G. Carter. I live at Macon, Ga., and am now in the employ of the Central of Georgia Ry., as assistant engineer. I was employed as such during the time that the railroads were under government control. That is a blue print showing the location of the tracks at Smithville, Ga., with depot and coal chute,—there is the passenger station with the waiting room in it and the Montgomery main line. This over here is a coal chute. I know where the switch point is and the point of the frog near the coal chute. The switch point here is marked 28.8 feet from the end of the chute

and the point of the frog is 76.5 feet further towards the station,—the point of the frog is 76.5 feet from the point of the switch. There is the crossing, this dotted line there. This arrow points toward the north. From this standpipe to the point of the frog there is 185.2 feet, and the standpipe from the south side of the crossing is about ten feet. Those figures 12 and 12/8 represent the distance between the center lines of these tracks. There are three tracks there, 12 feet between the center line and main line of the first track and 12.8 between that track and the outside track. That's a correct blue print of the location there at Smithville,—made by accurate measurements, measured right on the ground.

OFFERS IN EVIDENCE

Defendant tenders in evidence a blue print identified by the witness Carter, the same being marked Exhibit A, and attached hereto.

Defendant then tendered in evidence a diagram showing measurements of the engine and tender marked Exhibit B, and made a part hereof.

Defendant then tendered in evidence photographs of engine- 1616 and 1622, marked respectively Exhibits C, D, and E, and made part hereof.

Defendant tendered in evidence photographs of the local situation identified by the witness and marked Exhibits F, G, H, & I, respectively.

Defendant tendered in evidence a duly certified copy of the order of the interstate commerce commission signed by Geo. B. McGinty, secretary of the interstate commerce commission, under the seal of the commission, the same purporting to be a true copy of the order of the commission entered March 13, 1922, in the matter of designating the number, dimensions, locations, and manner of application of certain safety appliances, the original of which order is on file and of record in the office of said commission, with the further certificates that said order was in effect during the month of January, 1920. The same being adopted after hearings before the interstate commerce commission on September 29 and 30 and October 7, 1910, and February 27, 1911; the said hearings being held and the order adopted under the third section of an act of Congress approved April 14, 1910, and the order providing that the number, dimensions, location and manner of application of the appliances provided for by section 2 of the act of April 14, 1910, and section 4 of the act of March 2, 1893, shall be as follows: "The order then makes provisions for safety appliances on 'box and other house cars,' 'Hop-per cars and high-side gondolas with fixed ends,' 'Drop-end High-side Gondola cars,' other kinds of gondola cars, 'Flat cars,' 'tank cars with side platform,' and other tank cars, caboose cars, passenger cars of various kinds and 'steam locomotives used in road service.'" The only material portion of the order applicable under the last named [fol. 59] head reads as follows:

"Rear End Hand Holds: No: Two (2).

Dimensions: Minimum diameter, five-eighths of an inch, wrought iron or steel. Minimum clear length, fourteen inches. Minimum clearance two (2) preferably two and one-half inches.

Location: Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of hand hold shall be not more than sixteen inches from side of tender.

Manner of application: Rear-end hand holds shall be securely fastened with not less than one-half inch bolts or rivets."

In the order referred to under "specifications common to all steam locomotives," the only material and applicable portion appears on page 37 under heading "Hand Rails and Steps for Head Lights," the same being as follows:

"A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets."

Defendant then tendered in evidence an affidavit of the plaintiff Allie E. Manry, dated March 4, 1920, made to the Continental Casualty Company, the same being made as part of his proof of loss to recover for the accident involved under his policy in said company No. 3,701,308, the material portions of which are as follows, the questions being numbered and printed and the answers being written in ink. The affidavit referred to being made before a notary public of Bibb county, Georgia, under the seal of said notary:

"11. What were you doing at the time the injury was received, and how did it happen?

Was on back of engine tank while eng. was backing up to pick up baggage and mail car. Foot slipped and I fell and got both legs cut off."

[fol. 60] "18. Who were present at the time injury was received?

King Hardy, Albany, Ga., Arthur Williams, Albany, Ga."

"30. What indemnities are you claiming?

\$4,600.00 double limb loss.

Defendant rests.

A. E. MANRY, recalled for plaintiff, testified:

When I got off the coal chute and on to the engine, I didn't give to the engineer any signal to back up. I had a lantern in my hand when I was going back across there. From the front of the tender to the back end, I had to walk over the top of the coal and down in the back—a pile of loose coal. In reference to the ladder shown on the photograph of engine 1616 that ladder did not extend above or protrude above the top of that flare at the time I was hurt. The top of the ladder came to about 6 inches of the top of the flare sheet. I do not know when this ladder was changed. I know the ladder did not stick up above the tender because I had been using it, and I

know I had nothing to hold on to but the rim of the tank; that was all I had to hold to. (Witness demonstrates manner in which he was coming down from top of the tender and said) I come down from the tender in this position, and I caught the rim of the tender in that position. It was necessary to catch it in that position. It was necessary to catch it in that position because I was facing that way, in order to turn around and change my hands this way and get on the left. I had to make a turn around and feel with my foot for the ladder on the back of the tender, I had nothing to hold on to but the rim of the tender. That did not throw my hands when I stepped around on the proper side, I was in this position, as I turned around; that's not the proper position. If I walk around on the other side of that desk, right around that end on that side of the desk, that will [fol. 61] place my hands in proper position to hold on to the best advantage. I walked back on about the center of the tender when I came back, until I got toward the lower end, I was then over toward the left side, over this way. That grab iron on the side of the tender cannot be used by a person going down that ladder at the end of the tender. The engine started off with a jerk and all. I couldn't say how fast it was going; I had not reached the point where the frog is when I fell off or was thrown off. After falling, I reached and tried to catch the drawhead here, and I missed it, and I jerked my legs in. I was lying I judge straight across the rails, and I jerked my legs in here, jerked my head in and caught this axle of the wheel right along there on the right hand side, locking my hands around it, and in that position I held it and dragged with him about 30 or 40 feet, holding to the axle and it turning in my hands, until he stopped and they pulled me out from under the engine. About the same time I caught the axle I felt the wheel go over my legs. I was conscious when I was picked up. That photograph shows a correct location of the coal chute, frog, switch point and all things there. I can't indicate with that pencil the place where I fell off and the place where I was picked up, because I don't know—I couldn't indicate where I was at all. I was just starting away from the coal chute when I was thrown off. The Albany train had backed on to the Montgomery train to pick up the mail and express car, because I threw the switch for them to back in on it.

About the insurance, I carried sick and accident insurance with the Continental Casualty Company, and I notified them of my accident and they sent me this proof of claim to fill out in order to receive my insurance. It was made out in the Macon hospital, while I was confined in bed at the hospital, before I had gone home. When I started toward the back of the tender I did not notice Captain Hardy or this negro porter standing up the track. I was looking [fol. 62] where I was going—walking, because it wasn't good day. You can't walk across a pile of loose coal on a tender like that smoothly and be able to get a good foothold, you will slip up if you don't watch out. I couldn't say whether the bell was rung before I was precipitated from off the top of the tender. I didn't hear it ringing. The bell was on the front of the engine something like about 30 feet from where I was. With reference to walking across

the rear of the tender on the lift rod, I hadn't gotten down to that place to walk across it. When I fell I had never left the top of the tender up there. I was on the inside of the tender with my hands on this flange iron, and endeavoring to lift my body from the inside of the flange over to the ladder on the outside, and that is when the engine started off. I had not gotten down to where I could walk across this. I testified this morning that it was my duty to make this coupling and that I had to be back there to make it.

Cross-examination:

I mean to say it was my duty to make the couplings. I could have made that coupling after the engine stopped, before it reached the other train, by waiting until I could get to the back end of it and stand there and wait. I could have gotten on the engine and gotten off there. Whatever the condition of the ladder on the rear of the tender was, as to whether it protruded a few inches above or a few inches below this flange, it was in the same condition as I had been using it for several years prior to this occasion. My recollection is that this ladder was a few inches below the iron flange at the top of the tender, that round did not show above the top of the tender like it shows in this picture.

Redirect:

As a baggage master I had occasion to observe frequently the start-[fol. 63] ing off of naked locomotives. It depends on the engineer as to how they start off—some start with a jerk and some smooth.

Plaintiff rests.

IN LEE SUPERIOR COURT

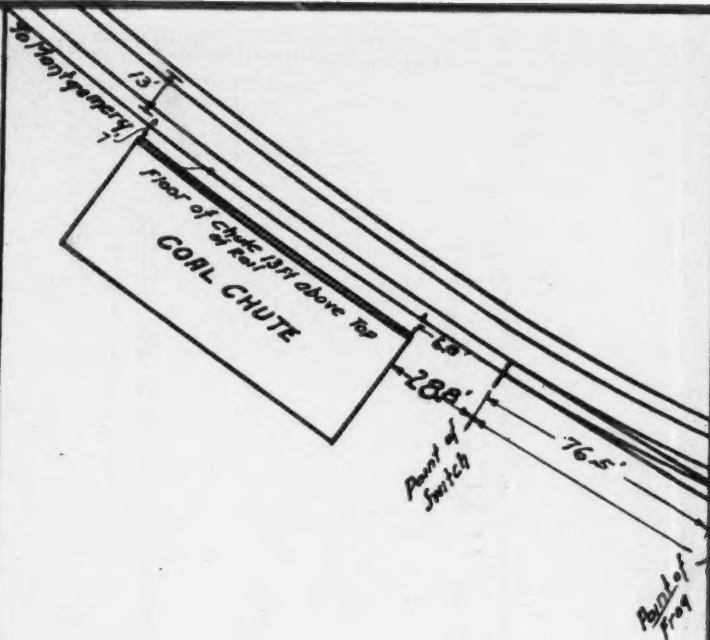
ORDER SETTLING BRIEF OF EVIDENCE

The foregoing brief of evidence, together with all exhibits therein referred to and hereto attached, is hereby approved as a true and correct brief of the evidence in the case of A. E. Manry against Jas. C. Davis as director general of railroads and agent under section 206 of the transportation act of 1920, therein referred to and the same is ordered filed as a part of the record in said case.

This July 8th, 1922.

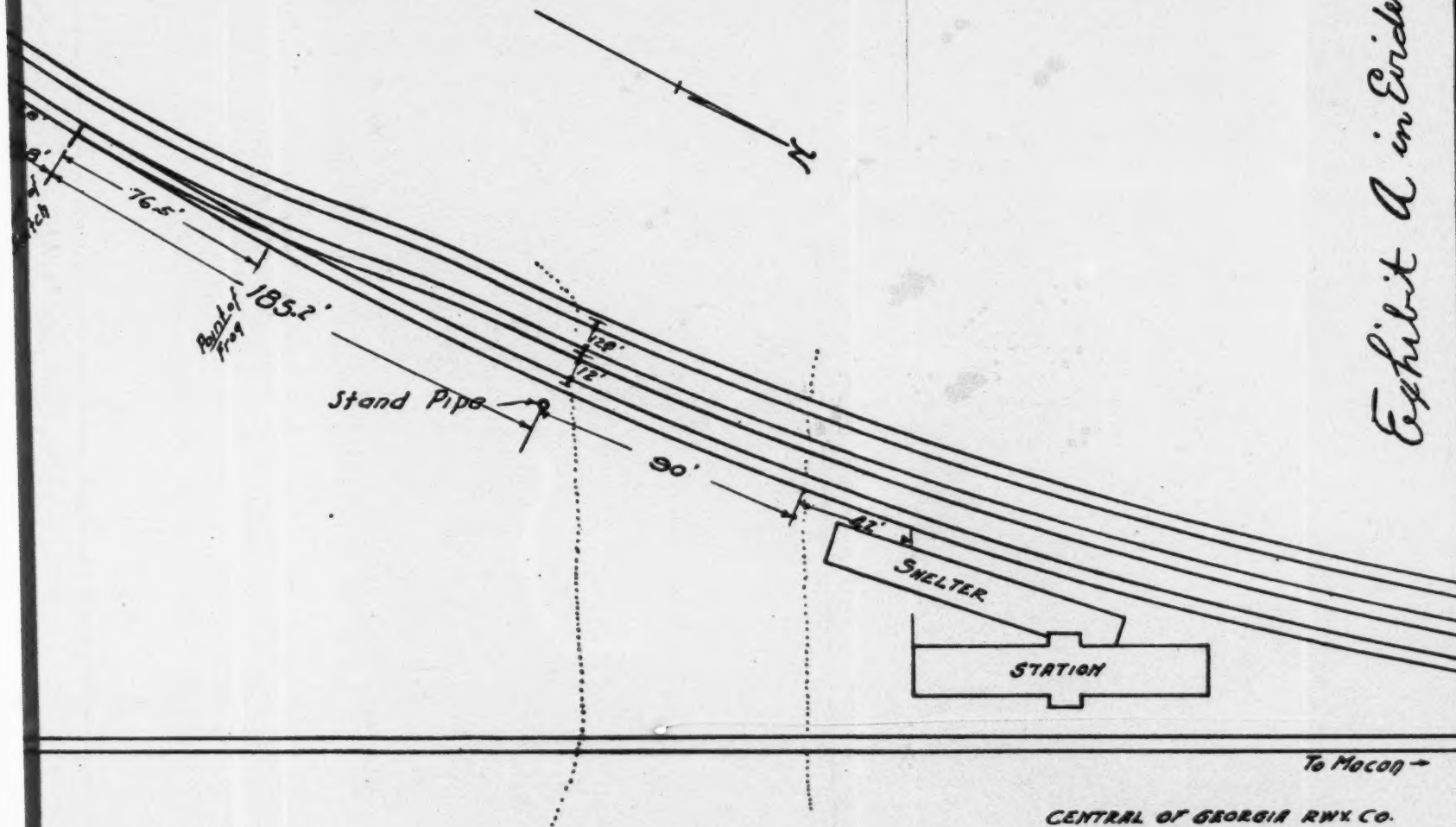
Z. A. Littlejohn, J. S. C. S. W. C.

(Here follow Exhibits A, B, C, D, E, F, G, H, and I, marked side folio pages 64, 65, 66, 67, 68, and 69)



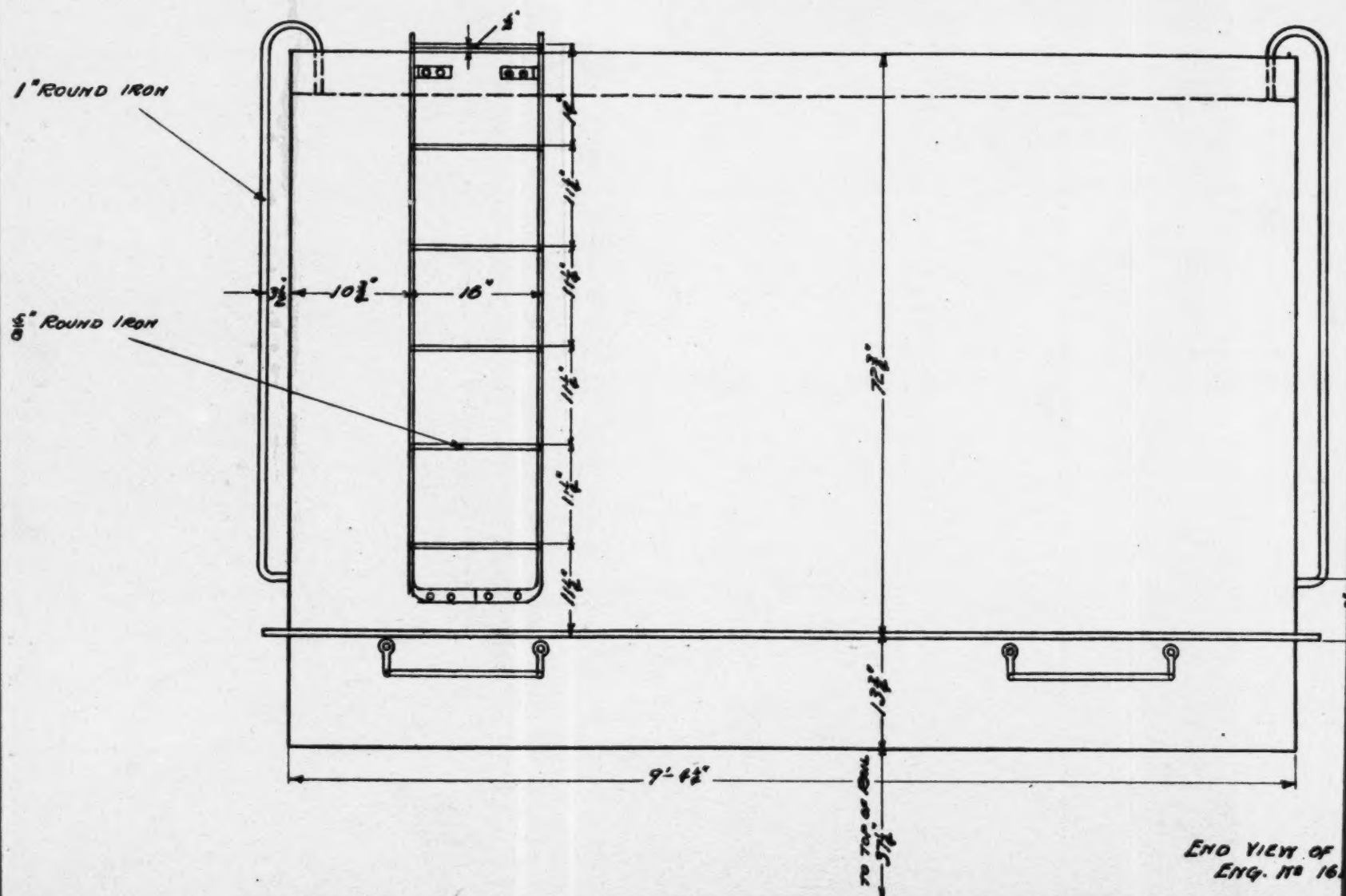
To Albany

Exhibit A in Evidence. 64



CENTRAL OF GEORGIA RY. CO.
SMITHVILLE GA.
PLAN SHOWN SCENE OF
A.E. HARRY'S ACCIDENT.
SCALE 1"=50' OCT. 8, 1921.
BY: H.G. CARTER.

ROUNDS OF LADDER 2½" FROM REAR OF TENDER



ROUNDS OF LADDER $2\frac{1}{2}$ " FROM REAR OF TENDER

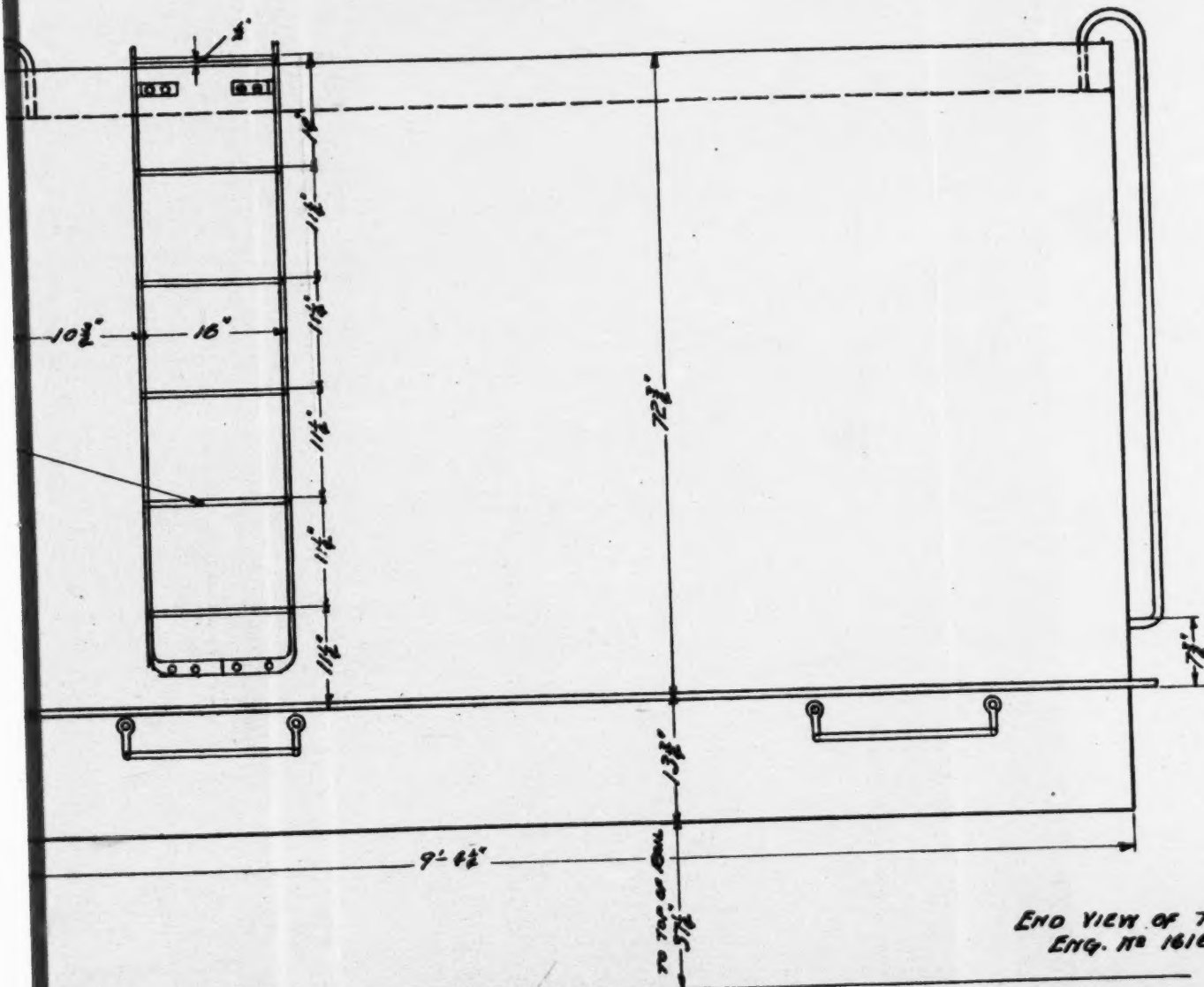


Exhibit 13, in Evidence





Exhibit D

EVIDENCE

67

45

EVIDENCE

68

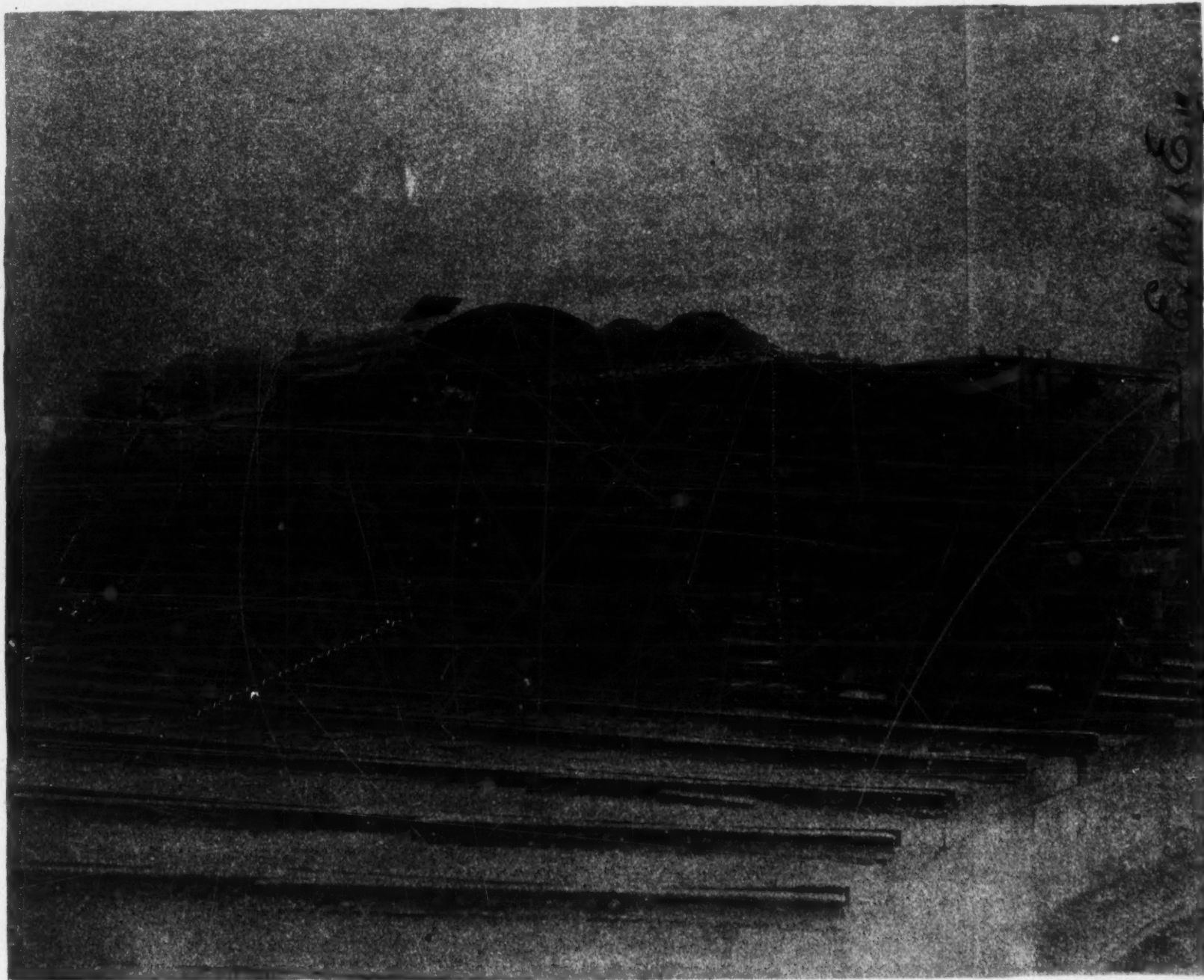


EXHIBIT F IN EVIDENCE



EXHIBIT G IN EVIDENCE

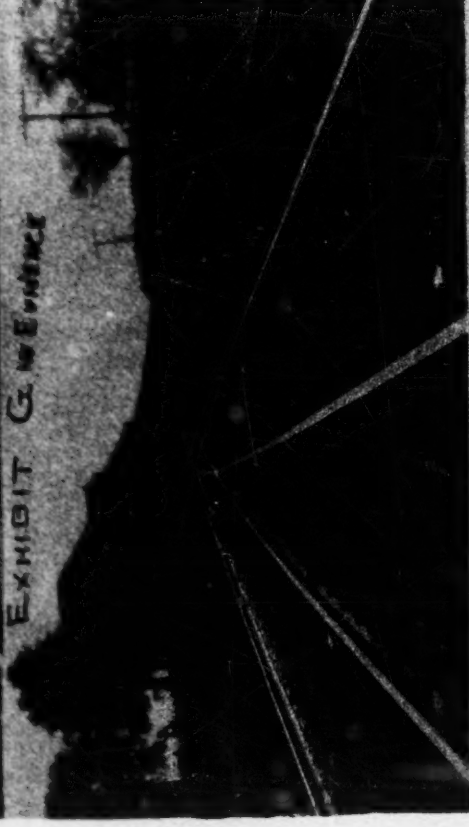


EXHIBIT H IN EVIDENCE



EXHIBIT I IN EVIDENCE



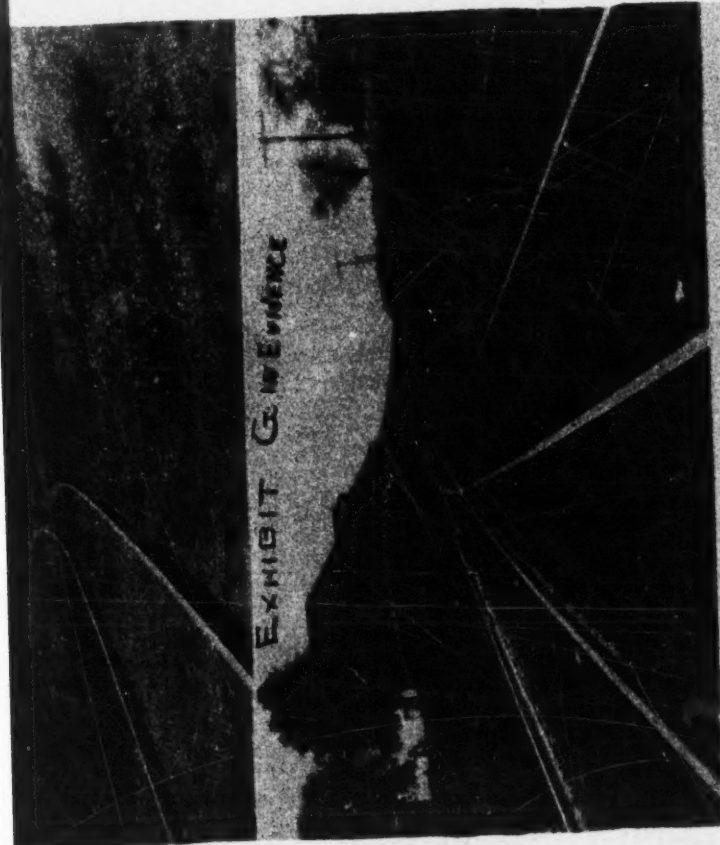


EXHIBIT G IN EVIDENCE



EXHIBIT H IN EVIDENCE

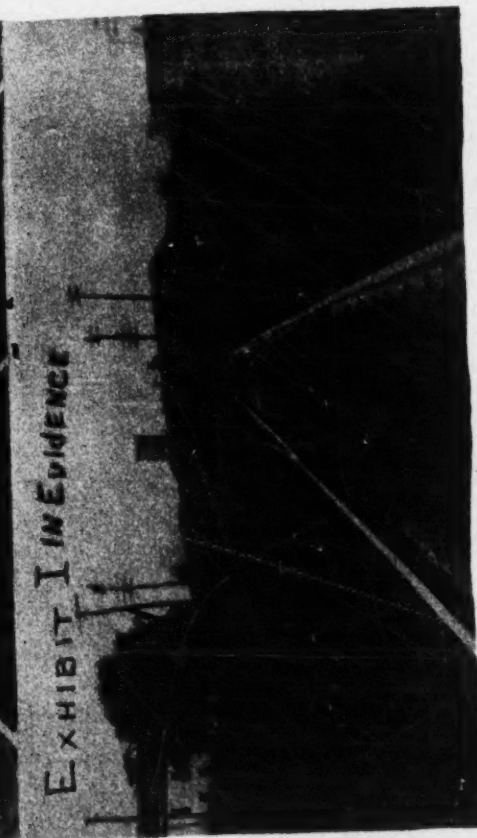
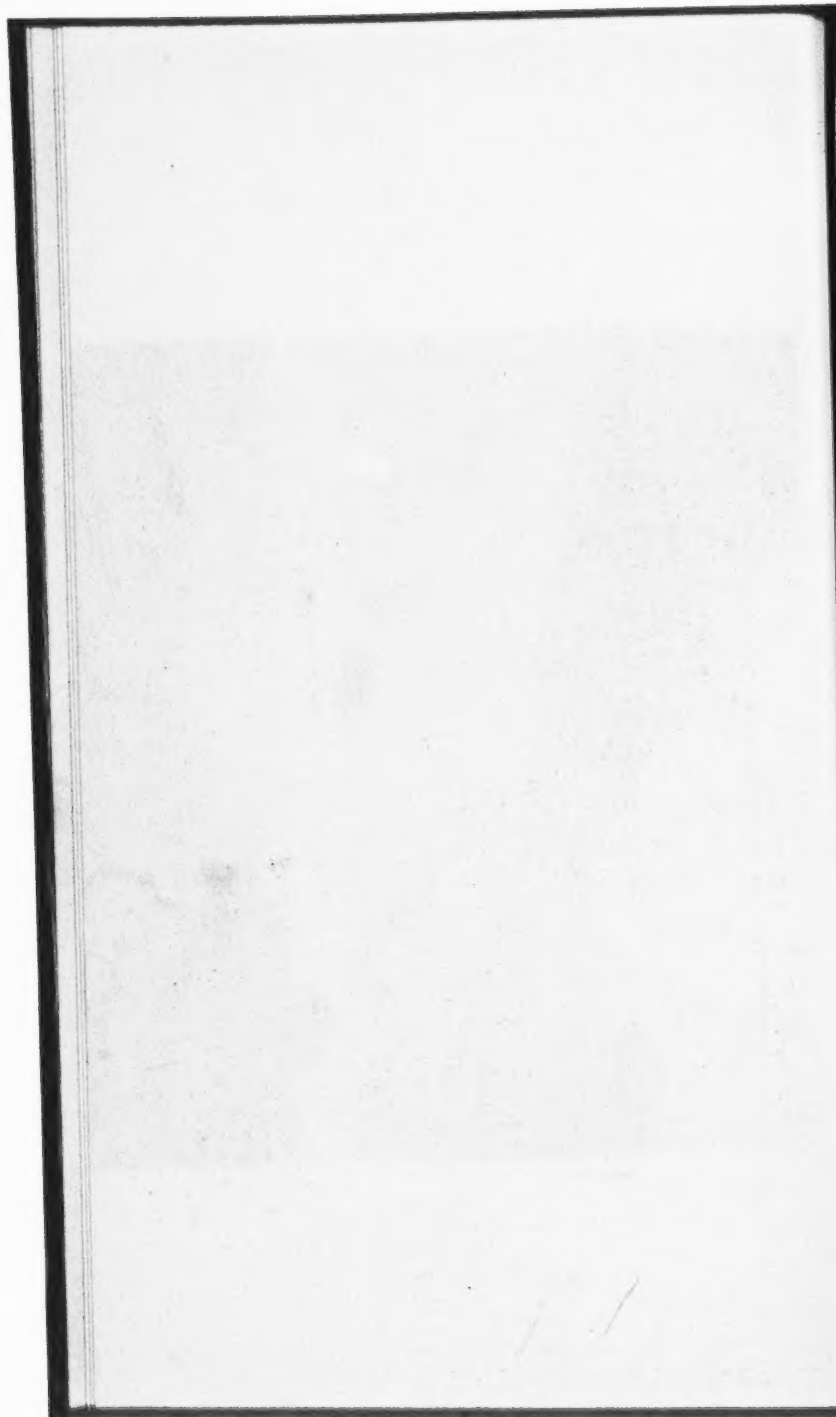


EXHIBIT I IN EVIDENCE



[fol. 70] IN LEE SUPERIOR COURT, MAY TERM, 1922

[Title omitted]

Suit for Damages

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

A. E. Manry brings his petition in this case against John Barton Payne as director-general of the railroads of the United States and agent under section 206 of the transportation act of 1920. James C. Davis succeeded John Barton Payne, and this case is now proceeding in the name of James C. Davis, he occupying the position formerly occupied by John Barton Payne at the time of the institution of this suit.

Now the plaintiff in the case alleges in the first paragraph of his petition that the defendant has injured and damaged him in the sum of \$50,000.00. He alleges that on the 29th day of January, 1920, and prior and subsequently thereto, that Walker D. Hines as director-general of railroads of the United States was operating the southwestern division of the Central of Georgia Railway Company between Macon, Georgia, and Montgomery, Alabama, under a contract as provided in the act of Congress relating to the operation of railroads during the period of the late war. He alleges that he was employed by the defendant, Walker D. Hines, as director-general of railroads, as aforesaid, during said time and was working in the capacity of baggage man. He alleges that at Smithville, Georgia, in said county of Lee, on or about the 29th day of January, 1920, and at about six o'clock a. m., he was baggage man on train number eleven (11) from Macon, Georgia, to Montgomery, Alabama, and at the time and place aforesaid was engaged in assisting the train crew in coaling the engine drawing said train, which was then and there the duty of the plaintiff; and that he was then and there acting [fol. 71] for said defendant in the discharge of his duty as an employe of defendant in the capacity of baggage man. He alleges that the engine had been coaled, and that the train crew were going to their respective posts of duty, and that he had stepped down from the coal chute on to the tender of said locomotive, and was going back to the rear of said tender to climb down the ladder at the rear thereof and get over to the side of said tender so that he would be in position at the proper time and place to adjust the couplers between the tender and the train, and to see that the coupling was duly and properly made. He alleges that at the rear of the tender on the locomotive there is a sheet iron flange that extends up above the top thereof at an angle of about sixty degrees and the ladder on the rear of the tender does not come up and over the top of this flange, so that a person going from the top of said tender over said flange and down on to said ladder has any hand hold or other thing to securely hold himself, except to clamp his hands on the sheet iron

flange. He alleges that just as he was in the act of climbing over the rear of said tender and while in full view of the engineer in charge of the locomotive, who he alleges to be H. T. Flood, the said engineer put said locomotive in motion, and before plaintiff could turn on said ladder and securely brace and hold himself thereon, and before he could reach his final destination, which was the ladder on the side of the tank, the engineer had said engine in motion, and by a sudden, unusual, and unnecessary jerk of said engine, he was suddenly thrown to the ground and said locomotive was backed over him. He alleges that he had presence of mind to grab one of the rods or axles passing over him and hold fast to the same in order to avoid being killed and managled and mutilated under said engine. But he alleges that notwithstanding this fact, that while he was being dragged under said engine his legs came in contact with [fol. 72] the wheels under the tender of the locomotive and both of his legs were mashed off at or just below the knee. He alleges that at the time in question he was in the discharge of his duty—at the time of this alleged injury that he was in the discharge of his duty, at his post where duty required him to be, and in the exercise of ordinary case and diligence. He alleges that Walker D. Hines, as director general and by his agents, servants, and employes in said transaction he details, were negligent in all of the particulars herein alleged, and especially to wit:

(a) In failing to furnish him with a reasonably safe place in which to work.

(b) In failing to have the ladder on the rear of said tender extend up to and above the top of said sheet iron flange so that he would have had a hand-hold to hold and brace himself at the time in question.

(c) In failing to place a grab-iron or hand-hold on said sheet iron flange at or near the top of said ladder.

(d) In putting the locomotive in motion while he was endeavoring to climb over said sheet iron flange and down on to said ladder, at which time he alleges he was in full view of and his dangerous and perilous situation known to the engineer in charge of the locomotive.

(d) In failing to stop the locomotive when plaintiff fell, and thereby avoid cutting off his legs.

He further alleges that at the time in question he was in the exercise of ordinary care and diligence, and that he could not by the exercise of ordinary care and diligence have avoided the consequences to himself occasioned by the negligence of the defendant, his agents, servants, and employes.

He alleges that by reason of and — the result of these alleged injuries, he has suffered excruciating physical pain and mental anguish, and that he will continue so to suffer throughout the remaining years [fol. 73] of his life.

He further alleges that at the time of this alleged injury he was

in good health, twenty-nine (29) years of age, earning one hundred and fifty (\$150) dollars per month, and that his earning capacity would have increased.

He further alleges that as a result of these alleged injuries he is permanently disabled to work and make money, and that his physical deformity will be a source of mental anguish throughout the remaining years of his life.

Then he makes the allegations that I have formerly referred to, that John Barton Payne was appointed to succeed Walker D. Hines who had charge of the railroads at the time of this alleged injury; and then, by amendment; that James C. Davis now occupies that position.

He brings suit for the recovery of his damages, which he alleges to be in the sum of fifty thousand (\$50,000) dollars, against the said agent, James C. Davis.

There is in this petition paragraph ten (10), which has been stricken and is not to be considered in this case; and plaintiff amends his petition by placing therein, instead of that paragraph, that after the alleged injury he was taken in charge by the officers, agents and employes of the defendant, and carried to Americus, Georgia, for medical attention, where the surgeons of the defendant gave him medical attention; and that he was thereafter removed from Americus to Macon, Georgia, where he remained under the care and attention of the defendant's surgeons for several weeks before his wounds healed.

Now, gentlemen, I have outlined to you the allegations made by the plaintiff in this case.

The defendant in the case comes in and files his answer to these allegations, and in this answer he admits the second, third and sixteenth paragraphs of the plaintiff's petition, which alleges that on [fol. 74] the date of this alleged injury that this railroad was being operated from Macon, Georgia, to Montgomery, Alabama, by Walker D. Hines, agent, and that the plaintiff, Manry, was employed by Walker D. Hines, and that Walker D. Hines was subsequently succeeded by John Barton Payne, he being succeeded by James C. Davis. The defendant further answers in this case that for want of information that they can neither admit nor deny certain paragraphs as alleged—paragraphs 4, 5, 6, 8, 13, 14, and 15 of the plaintiff's petition. For want of information they state that they are unable to admit or deny these paragraphs. That is, that at Smithville, Georgia, about six o'clock a. m., January 29th, 1920, plaintiff was baggage man on train No. 11 from Macon, Ga., to Montgomery, Ala., and at the time and place stated was engaged in assisting the train crew in coaling the engine drawing said train, and that he was then and there acting for said defendant in the discharge of his duty as an employe of the defendant railway company.

And also, for want of information, they say they cannot admit nor deny that the plaintiff had stepped down from the coal chute on to the tender of said locomotive, and was going back to the rear of said tender to climb down the ladder at the rear thereof and get over to the side of said tender to be in position at the proper time to place and adjust the couplers between said tender and the train.

Defendant denies plaintiff's allegation wherein he alleges that the ladder on end of the tender does not come up and over the top of the flange, so that a person going from the top of said tender over said flange and down to said ladder had no hand hold or other thing by which he could hold to except to clamp his hands on the sheet iron flange.

Then they say that for want of information they are unable to either admit or deny the paragraphs read to you as to the mangled condition of the plaintiff, Manry. Also the paragraph which [fol. 75] alleges that as a result of the injury he has suffered excruciating pain and mental anguish, and that he will continue to so suffer throughout the remaining years of his life. For want of sufficient information they are unable to admit or deny that.

They say that for want of sufficient information they are unable to admit or deny the paragraph which alleges plaintiff's age, and his good health, and the amount he was earning at the time of this alleged injury.

Also that they are unable to admit or deny that the plaintiff's physical disabilities are permanent, and as to the mental anguish, pain and suffering thereby.

They deny the following allegations of the plaintiff's petition: Paragraph one, which alleges that this railroad company has damaged him as alleged in that paragraph.

They also deny the allegations that he makes, that at the time of this alleged injury that he was climbing over the rear of the tender and while doing so was in full view of the engineer in charge of the locomotive, H. D. Flood, and that said engineer put said locomotive in motion before plaintiff could turn on said ladder and securely brace and hold himself thereon, and before he could reach his final destination, which was a ladder on the side of said tender, that said engineer put said engine in motion, and by a sudden, unusual and unnecessary jerk of said engine the plaintiff, Manry, was suddenly thrown to the ground, and said locomotive backed over him. Also, that he was at that time in the discharge of his duties. They deny these allegations of the plaintiff. Also, that that the defendant was negligent in failing to furnish plaintiff with a reasonably safe place in which to work; in failing to have the ladder on the rear of said tender extend up and over the top of said sheet iron flange, so that he would have had a hand hold to hold to and brace himself at the time in question; and failing to place a grab iron or hand hold on [fol. 76] said sheet iron flange near the top of said ladder; and in putting the locomotive in motion while plaintiff was endeavoring to climb over said sheet iron flange and down on to the ladder; and that he was in full view of and his dangerous and perilous situation was known to the engineer in charge of the locomotive; and that the engineer failed to stop said engine when the plaintiff was thrown from same.

Defendant further denies the allegations in the plaintiff's petition, that at the time of this alleged injury that the plaintiff was in the exercise of ordinary care and diligence; and that he could not have, by the exercise of ordinary care and diligence, avoided the conse-

quences to himself occasioned by the negligence of the defendant, its agents, servants and employes, if there was any.

Defendant denies further, that it has damaged and injured the plaintiff in the sum as alleged in this case.

Now, gentlemen, that is in substance the allegations made by the plaintiff in this case, and the answer and denial on the part of the defendant. They do not deny the allegations in the petition that at the time of this alleged injury that they were operating this train from Macon, Georgia, to Montgomery, Alabama, and this man was an employe on that train. Further answering, they say, that under the acts of negligence complained of by the plaintiff, that there is no liability upon the part of the defendant to account to the plaintiff; and that whatever injuries, if any, he sustained, was due to his own negligence, or was due to an accident, or was due to one of the ordinary risks assumed by the plaintiff, incidental to the duties which he was employed to perform. They contend that in either of those events the plaintiff in this case is not entitled to recover.

Now, gentlemen, in order to settle the truth of the allegations you are to look to the testimony. You have seen and heard the witnesses that have been sworn and examined before you. Such documentary evidence as has been admitted in evidence, you will have out with you during your deliberations and you can read it [fol. 77] and consider it during your deliberations, and from those you are to settle what is the truth of the contentions that are made between the plaintiff, Manry, and the defendant in this case; and as you may determine that question, the truth of these contentions, you are to apply whatever you find to be the facts of the case to the rules of law given you in charge by the court, weigh them and let your verdict speak as they may warrant.

Now, I charge you that in this case the burden of proof rests upon the plaintiff, Manry, and that there is no presumption of negligence against the defendant. The fact that the plaintiff may have been injured raises no presumption of negligence against the defendant, but the burden rests upon the plaintiff Manry, throughout the case to prove that any injury he may have received was caused by negligence of the defendant.

If you should believe in this case that the plaintiff was injured and if you should further believe that the sole cause of his injury was his own act, whether that act be negligent or not, then there can be no recovery in this case by the plaintiff, and your verdict should be in favor of the defendant.

If, in passing upon this case you should find from the evidence that the plaintiff's injuries were due to an accident, then I charge you that your verdict should be in favor of the defendant. That which is an "accident" in the law, is something that occurs after the exercise of a care that the law required to be exercised to prevent the occurrence. And "accident" is also defined as an event happening unexpectedly and without fault on the part of any person.

Where one is employed in a work which necessarily involves more or less danger, he assumes the risks ordinarily and usually incident to such employment or work.

A railroad is not an insurer of the safety of its employees and [fol. 78] every employe assumes, when he takes employment, the risk incident to the class of work which he is to perform. The assumption of risk taken by the employe, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risk may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duties. Such dangers as are normally and necessarily incident to the occupation of the employe are presumably taken into account when the relation of employee and employer is entered into; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not; and if you should believe from the evidence in this case that the plaintiff's injuries were the result of one of the risks incidental to his employment, then I charge you that it would be your duty to find a verdict in favor of the defendant.

Where there are two ways or methods to perform a duty by a railway employe, one safe and the other unsafe, it is the duty of the employe to adopt and use the safe way or method, and if he employs the unsafe method and is injured because of the use of such unsafe method, then, under the federal act that would be a contributory negligence which would reduce the plaintiff's right to recover, if he was entitled to recover at all, or if the use of ordinary care and diligence on the part of the plaintiff would have required him to have adopted the safe way, and he adopted the unsafe way—not exercising ordinary care and diligence—and an injury resulted to him therefrom—and—without any negligence on the part of the railway company, then he would not be entitled to recover at all.

Now, referring to ordinary care and diligence, gentlemen, or reasonable care and diligence, I might say here that ordinary care and diligence, or reasonable care and diligence means that care and [fol. 79] diligence which every prudent person under like circumstances would exercise; and in applying and dealing with the question as to reasonable care and diligence, I give you that as a rule to govern you.

Now, in this case, in regard to the question of safety appliances, I charge you that the federal employers liability act, under which law this case is being tried, requires that all cars having ladders shall be equipped with secure hand hold or grab irons on the roof at the top of such ladders, and an employe of any such common carrier who may be injured by any locomotive by reason of a failure on the part of the common carrier to so equip the locomotive with such hand hold or grab iron, would be entitled to recover; that is, if the injury resulted to him by reason of a failure on the part of the defendant to have its locomotive or tender so equipped. If they were not so equipped, and the injury did not occur to him by reason of their failure to do so, then that would not give him a right to recover. Now, under the facts of this case you are to determine whether this plaintiff was injured in the manner as alleged

by him in his petition. The burden is on him to establish the fact that he did receive his injury in one or more of the ways as he has set forth and alleged in his petition; and that that injury resulted from negligence on the part of the defendant railway company. If you should determine that the plaintiff was injured, but that the injury did not result from any negligence on the part of the defendant, or its agents, its servants, or its employees, then the plaintiff would not be entitled to recover, even though he may have been injured, he would not be entitled to recover, because the defendant would not be liable to account to him.

If you should determine that the plaintiff was negligent at the time, and that the defendant was negligent also, but that the injury did not result solely from the negligence of the plaintiff, Manry, [fol. 80] then he would be entitled to recover but the recovery should be diminished according to the contributory negligence on his part. If the injury resulted from negligence of both, that is, the employee, Manry, and the defendant, its agents, its servants, or its employees, the plaintiff would not be entitled to recover the full damages that he may have sustained, but only a partial amount,—bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both of the parties.

An employee, gentlemen, in performing his duties on a railroad in the running of trains or locomotives may assume that the co-employees will exercise proper care for his safety until he has some notice to the contrary, unless the circumstances are such as to be obvious to an ordinarily careful or prudent person under the circumstances as they may exist at the time.

Now, as I stated in the outset, gentlemen, it is contended in this case by the plaintiff that at the time of this alleged injury, that he had gone back over the tender for the purpose of descending upon a ladder on the back end of the tender, in order to make a coupling, and that while he was endeavoring to get over the flange at the top of the tender on to this ladder at the end of the tender, that the engineer put the engine in motion and by a sudden, unnecessary and unusual jerk, that he was thrown from the tender and was injured and damaged as he alleges in this case, by the wheels of the tender running over his legs. He alleges that by a failure on the part of the railway company to have the ladder properly equipped with a grab iron, this injury resulted to him. That the only hold he had was by this flange at the top of the tender, and that while in that position, and by reason of having that kind of a hand hold—and not being supplied by a hand hold on the ladder—extending as required under the act, did this injury result.

[fol. 81] The defendant denies that as being the truth of the case. They contend that this plaintiff had descended from the top of the tender, had gone down this ladder, and that he was attempting to walk across the back of the tender and that his foot slipped and that he fell, and that was the cause of this injury to him. That it was done negligently on his part, and that he was not injured by reason

of the negligence that he alleges on their part and which he contends contributed to this injury.

Now, gentlemen, as I stated before, you have heard the testimony in this case, and it is for you to settle what are the facts, then after having done that—apply whatever you determine to be the facts to the rules of law that I have given you in charge, in passing upon and settling these issues as to whether or not this plaintiff is entitled to recover and, if so,—what amount he would be entitled to recover?

Now, gentlemen, if, after taking the facts and applying them to these rules of law that I have given you in charge, If the plaintiff was injured as a result of the defendant failing to comply with the safety appliance act, then he would be entitled to recover, even though he had notice of such failure and continued to use such appliances after notice of such failure to comply with the act.

Now, after taking the facts, gentlemen, and applying them to these rules of law that I have given you in charge, if you find that the plaintiff was injured and damaged as alleged in this case, and that it resulted from negligence on the part of the defendant, then the plaintiff would be entitled to recover, and the next question that would present itself to you would be how much—what amount he is entitled to recover. Now, in this case the plaintiff sets up and asks recovery of damages for physical pain and suffering, and for mental anguish as a result of this alleged injury. Now I charge [fol. 82] you that in determining the question of physical pain and suffering or any mental anguish as resulted from the wounds or the effect of the wounds upon the person of the plaintiff, the law leaves that to the enlightened minds and consciences of impartial jurors. That is, you are to take all of the facts that bear upon that question and settle and determine what the plaintiff should be allowed as his damages for physical pain and suffering and for mental anguish. In reaching that conclusion, while that is left to the enlightened minds and consciences of impartial jurors, the jury should be careful to weigh and take all of the circumstances disclosed by the trial into consideration, and determine that question, and see that they do not do either party an injury in fixing damages for physical pain and suffering, or for mental anguish, and it is a question left to the enlightened minds and consciences of impartial jurors.

The plaintiff sues also for permanent injuries. He contends in this case that by reason of this alleged injury that his earning capacity has been diminished and he asks to recover for loss of earning capacity. Now, you have heard the testimony upon that question, and if the plaintiff has been permanently injured, then he is entitled to recover, that is, if he is entitled to recover in this case and there has been a permanent injury, then he is entitled to recover for permanent injuries, and the jury in determining that question should take all of the facts disclosed by the trial that bears or throws any light upon that question, in determining what amount he is entitled to recover. They should inquire and determine if his earnings have been lessened. If so, to what extent? What amount has his earning capacity been lessened? The plaintiff alleges that

he was 29 years of age at the time of this alleged injury. That he was a man in good health; and that he was at that time earning \$150 per month. You are to take all of that into consideration in passing upon that question; and also determine from the evidence whether [fol. 83] he can still earn money, and, if, so, to what extent, and find the amount of the diminution or reduction in his earning capacity, and then you are to use the experience that you have in every day life in determining and settling that question. There is nothing here except for you to use your own judgment as to the probable length of time of the average man's life, taking the facts and reaching that conclusion from the facts of the case, and upon that question I charge you that if the facts disclose in the case upon trial that the expectancy of the person under consideration would have been probably greater or less, than the length of life of the average man, the damages to be allowed should be increased or diminished accordingly; and in reaching and determining that question as to what amount he is entitled to recover for permanent injuries, the diminution of his earning capacity and the length of time that he would be expected to live, and you should take into consideration the questions of feebleness of health—actual sickness, or loss of employment, of voluntarily abstaining from work, dullness in business or reduction in wages, and the increasing infirmities of age with a corresponding diminution of earning capacity; and all other causes that may contribute in a greater or less degree to decreasing the gross earnings of a lifetime.

In estimating damages a proper allowance and deduction should be made in favor of the defendant for any diminution in income from labor which would have resulted from any of these sources.

Now, after settling that question, gentlemen, if you find that the plaintiff is entitled to recover under the facts of this case when applied to the rules of law that I have given you in charge, then when you have settled the amount, put that in one lump sum, and your verdict would read: We, the jury, find in favor of the plaintiff so many dollars and cents, stating the amount in a gross or lump sum. [fol. 84] After taking the facts in the case and applying them to these rules of law, I have given you in charge, if you find in favor of the defendant—that is—if you believe and find that the plaintiff under the facts of this case when applied to the rules of law given you in charge, is not entitled to recover of the defendant, then your verdict would simply be a general verdict of: "We the jury find in favor of the defendant." Whatever verdict you render, gentlemen, write it on this petition, let your foreman sign it and sign it as foreman. You may retire and consider your verdict.

The foregoing charge is hereby approved as the true and correct charge of the court in the above stated case, therein referred to, and the same is ordered filed as a part of the record in said case. This July 8, 1922.

(Signed) Z. A. Littlejohn, J. S. C., S. W. C.

LEE SUPERIOR COURT, MAY TERM, 1922

[Title omitted]

AMENDMENT TO MOTION FOR NEW TRIAL—Filed July 8, 1922

Now comes the defendant in the above stated case, and, by leave of court first had and obtained, amends his motion for new trial heretofore filed by adding thereto the following additional grounds, to wit:

Ground Four

Because the court erred in charging the *court* as follows:

"I charge you that the federal employers liability act, under which law this case is being tried, requires that all cars having ladders shall be equipped with secure hand holds or grab irons on the roof at the top of such ladders, and an employee of any such common carrier who may be injured by any locomotive by reason of a failure on the [fol. 85] part of the common carrier to so equip the locomotive with such hand holds or grab irons, would be entitled to recover; that is, if the injury resulted to him by reason of a failure on the part of the defendant to have its locomotive or tender so equipped."

The error in said charge being; as movant contends:

- (a) The same is incorrect as an abstract proposition of law;
- (b) Because the same was unauthorized by any pleadings in the case;
- (c) Because there was no evidence in the case that would authorize such charge;
- (d) Because the safety appliance act of Congress approved April 14, 1910, which requires all cars having ladders to be equipped with secure hand holds or grab irons on their roofs at the top of such ladder, was and is not applicable to the tender attached to a locomotive engine, because such tender is not a car having a roof and it was not intended that such statute should apply in the case of tenders.
- (e) Because the undisputed evidence shows that the ladder on the tender of the car in question upon which plaintiff was riding at the time of the injury was constructed in the manner required or permitted by the rules of the interstate commerce commission adopted March 13, 1911, in pursuance of the act of Congress approved April 14, 1910, and the act of Congress of March 2, 1893,—and being so constructed no liability could exist against this defendant on account of the fact that it was constructed as required or permitted by such rules.

5. Because the court erred in charging the jury as follows:

"Now, gentlemen, if, after taking the facts and applying them to these rules of law that I have given you in charge, if the plaintiff was injured as a result of the defendant failing to comply with [fol. 86] the safety appliance act, then he would be entitled to recover, even though he had notice of such failure and continued to use such appliances after notice of such failure to comply with the act."

The error in said charge being: as movant contends:

(a) Because the same is incorrect as an abstract proposition of law;

(b) The same was unauthorized by any evidence in the case;

(c) Because no safety appliance act of Congress was applicable under the facts in evidence;

(d) Because the undisputed evidence showed that the defendant had complied with all the safety appliance acts of Congress and of the rules of the interstate commerce commission with reference to safety appliances which had been passed by the commission under authority of the acts of Congress.

6. Because the court erred in refusing the following request to charge, the same having been submitted in writing before the jury retired to consider their verdict, said request to charge being, as movant contends, applicable to the facts of the case as shown by the evidence and being as follows:

"I charge you that if the ladder on the rear of the tender, referred to in the evidence in this case, was constructed as required or permitted by the rules and regulations prescribed by the interstate commerce commission under authority of an act of Congress, known as the safety appliance act, and that the injuries the plaintiff may have suffered in the case were due solely to the manner in which the ladder was constructed, then I charge you that the plaintiff could not recover and it would be your duty to find in favor of the defendant, because if the defendant in this respect has complied with the law, the law will not impose any liability upon him as long as he has complied with the law."

[fol. 87] 7. Because the court erred in refusing the following request to charge, the same having been submitted in writing before the jury retired to consider their verdict, said request to charge being, as movant contends, applicable to the facts of the case as shown by the evidence and being as follows:

"I charge you that under the acts of Congress and rules and regulations of the interstate commerce commission passed in pursuance thereof, the director general of railroads was under no duty to maintain on the flange or elsewhere on the top of the tender or tank any grab iron or hand hold. The law requiring hand holds or

grab irons to be maintained on the top of cars applies only to cars having roofs and does not apply to the tender of an engine such as the plaintiff was using at the time he was injured. So that, if you believe the plaintiff's injury was due solely to the absence of such a hand hold or grab iron on the tender, he cannot recover in this case."

Wherefore, movant prays that these additional grounds be inquired of by the court and that a new trial be granted him.

Pottle & Hofmayer, Defendant's Attorneys.

The recitals of fact and the grounds contained in the foregoing amended motion for a new trial are hereby approved as true, and the same is ordered filed as a part of the record in said case.
This 8th day of July, 1922.

Z. A. Littlejohn, J. S. C., S. W. C.

ORDER DENYING MOTION FOR NEW TRIAL

The foregoing motion for new trial coming on regularly this day to be heard, after argument had, a new trial is hereby refused.
This 8th day of July, 1922.

Z. A. Littlejohn, J. S. C., S. W. C.

[fol. 88] [File endorsement omitted.]

IN LEE SUPERIOR COURT, MAY TERM, 1922

[Title omitted]

CERTIFICATE OF CLERK

GEORGIA,

Lee County:

I hereby certify that the foregoing 83 pages is and contains a true and correct transcript of the record in the above stated case of A. E. Manry v. Jas. C. Davis, director-general of railroads and as agent under § 206 (8) of the transportation act of 1920, therein referred to, as required by the certificate of the presiding judge in the bill of exceptions and as the same appears of file in my office.

Witness my official signature and seal this July 17, 1922.

G. A. Wallace, Clerk Superior Court, Lee County, Ga.

[Seal.]

[File endorsement omitted.]

[fol. 89]

COURT OF APPEALS OF GEORGIA

[Title omitted]

OPINION

By the COURT:

1. A tender and the locomotive to which it is attached constitute a "car" within the meaning of the safety-appliance acts of Congress. *Pennell v. Philadelphia & Reading Railway Co.*, 231 U. S. 675 (58 L. ed. 430).

2. The provision of section 2 of the safety appliance act of April 14, 1910, requiring that "all cars having ladders shall also be equipped with secure hand-holds or grab-irons on their roofs at the tops of such ladders," in view of the ruling of the interstate commerce commission appearing in the record, and the undisputed evidence showing that a tender (with the locomotive to which it is attached) is within the class of "cars having ladders," and in view also of the general intent and purpose of the act, was properly held applicable to the tender, notwithstanding a tender, in a strict and literal sense, may have no roof.

3. The verdict in favor of the plaintiff was supported by the evidence, and no error of law appearing, the overruling of the motion of the defendant for a new trial was not improper.

BELL, J.: The plaintiff recovered a verdict and judgment against the defendant in the sum of \$7,500. The suit was under the Federal employers' liability act. The defendant excepts to the overruling of his motion for a new trial. The special assignments of error complain of certain charges of the court and of the refusal of requests to charge, but a determination of each of them will involve only the question of a proper application of section 2 of the safety-appliance act of April 14, 1910. The same question is presented by exceptions to the overruling of a special demurrer to parts of the petition.

[fol. 90] The plaintiff alleged that after having crossed from the front to the rear of the tender, he was thrown to the ground and run over by the cars, thus sustaining the injuries for which he sued. It is alleged that the defendant was negligent in failing to place a grab-iron or hand-hold on sheet-iron flange of the tender at or near the top of the ladder attached to the tender at the rear. Section 2 of the safety-appliance act above referred to provides: "All cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab-irons on their roofs at the tops of such ladders." The trial court in its charges and rulings, held that this section is applicable to tenders, and in this holding it is claimed there was error, for the reason that tenders have no roofs. The question seems never to have been passed upon

directly by any other court, and the answer is not easily derived from the statutes themselves. But section 1 of the act provides: "that the provisions of this act shall apply to every common carrier and every *vehicle* [italics ours] subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the 'safety-appliance acts.'" What vehicles, then, are subject to the previous acts herein mentioned? It is provided in the act of March 2, 1903, that the act and the previous acts should apply to "all trains, locomotives, tenders, cars and similar vehicles, used on any railroad engaged in interstate commerce * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," with certain exceptions not material to the present consideration.

Section 3 of the act of April 14, 1910, provides that the interstate-commerce commission shall designate the number, dimensions, location, and manner of application of the appliances provided for [fol. 91] by section 2 of this act and of section 4 of the act of March 2, 1893. A rule of the commission appearing in the evidence and conceded by both sides to apply to tenders is as follows: "A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets." Furthermore, it is established by the undisputed evidence that tenders have ladders. Notwithstanding the promulgation by the commission of the rule above quoted, it seems not to have required the placing of hand-holds or grab-irons upon tenders at the top of such ladders, and yet if the provisions of the appliance act herein considered should apply to tenders, the commission would have no power to dispense with a compliance therewith by a failure to include in their regulations a reference to hand-holds or grab-irons. *Illinois Central Railroad Co. v. Williams*, 242 U. S. 462 (61 L. ed. 437). The locomotive and tender together constitute a "car" within the meaning of the safety-appliance acts. *Pennell v. Philadelphia & Reading Railway Co.*, 231 U. S. 675 (58 L. ed. 430). Referring to the provisions of sections 2 and 3 of the act of 1910, it was said by the Supreme Court in the case of *Williams*, supra, that "the purpose of the 3d section is to require that the safety appliances provided for by section 2 of the act shall ultimately conform to a standard to be prescribed by the interstate-commerce commission; that is, that they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car."

As seen already, the only reason suggested by plaintiff in error in support of the contention that these provisions do not apply to tenders is that tenders have no roofs, and that section 2 in reference [fol. 92] to grab-irons is applicable only to cars having roofs. A tender and the locomotive to which it is attached are to be considered as a "car," and it appears unmistakably by the record that such a car is one required to have a ladder (attached to the tender).

Section 2 requires that such cars shall be equipped with grab-irons on their roofs at the tops of the ladders. Inasmuch as tenders, strictly speaking, have no roofs, we come to an apparent inconsistency in the law. In seeking a harmonious construction considerations of lesser importance should yield to the principal intent and purpose of the act. The prime object of the particular provision in question was the promotion of the safety of the employees. The acts are to be interpreted and applied in view of practical railroad operations. *Boehmer v. Pennsylvania Railroad Co.*, 252 U. S. 496 (64 L. ed. 680). From the viewpoint, then, of the ends to be attained, what is the significance of "roofs"? A roof is ordinarily intended for shelter, but that is not the object here to be accomplished, and the word "roofs" as employed in the act, is not necessarily to be understood in its ordinary literal import. The term should be construed not as applying to a part of the car designed for shelter, but as a place over which employees must pass in the discharge of their duties, or as a part of the car to which they may lay hold for their safety when ascending or descending to or from the top of the ladders, for any purpose in the discharge of their duty. Viewing the question from this angle, we think that the trial court was right in holding that section 2 of the act of April 14, 1910, should be applicable not only to cars literally having roofs, but to tenders as well. Any other construction would render more acute and pronounced the apparent inconsistency referred to, since the provision would then be inapplicable to some cars having ladders, though expressly applying to all cars so equipped. We think it more reasonable [fol. 93] able to construe the term "roofs" in the light of the use of a roof, within the above-mentioned object and purpose of this section.

No error of law appears to have been committed during the trial, and, the evidence being sufficient to authorize the verdict, the overruling of the carrier's motion for a new trial is affirmed.

Judgment affirmed. Jenkins, P. J., and Stephens, J., concur.

[fol. 94] COURT OF APPEALS OF THE STATE OF GEORGIA

JUDGMENT

Atlanta, April 18, 1923.

The Honorable Court of Appeals met pursuant to adjournment.
The following judgment was rendered:

J. C. DAVIS, Agent, etc.,

v.

A. E. MANRY.

This case came before this court upon a writ of error from the superior court of Lee county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Jenkins, Stephens and Bell, JJ., concur.
Bill of Costs, \$15.00.

[fol. 95]

IN COURT OF APPEALS

No. 13833

[Title omitted]

NOTICE OF APPLICATION FOR CERTIORARI—Filed April 24, 1923

To Mr. Logan Bleckley, Clerk Court of Appeals:

You are hereby notified that the appellant in the above stated case will apply to the Supreme Court for writ of certiorari in said case.

This April 23, 1923.

Pottle & Hofmayer, Attys. for Jas. C. Davis, Director-General of Railroads and as Agent under §206 (8) of Transportation Act of 1920. Albany, Ga.

[File endorsement omitted.]

[fol. 96] SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

Case No. 3771

NOTICE OF APPLICATION FOR CERTIORARI—Filed May 17, 1923

May 17, 1923.

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of J. C. Davis, agent, etc., v. A. E. Manry.

W. E. Talley, Deputy Clerk Supreme Court of Georgia.

Case No. 13833. Court of Appeals of Georgia. Notice of Application for Certiorari.

[File endorsement omitted.]

[fol. 97] SUPREME COURT OF GEORGIA

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—Filed May 30, 1923

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

J. C. DAVIS, Agent, etc.,

v.

A. E. MANRY.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office

Atlanta, May 30, 1923.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

W. E. Talley, Deputy Clerk. [Seal]

Case No. 13833. Court of Appeals of Georgia. Remittitur from Supreme Court.

[File endorsement omitted.]

[fol. 98] COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office

CLERK'S CERTIFICATE

Atlanta, July 7, 1923.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the entire record in the case therein stated as appears from the records and files of this office.

Witness my signature and the seal of said court hereto affixed, the day and year above written.

Logan Bleckley, Clerk. [Seal of Court of Appeals of the State of Georgia.]

(1113)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 495

[Title omitted]

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

ORDER GRANTING PETITION FOR CERTIORARI—Filed January 7, 1924

On consideration of the petition for a writ of certiorari herein to the Court of Appeals of the State of Georgia and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(3121)